United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-7273

United States Court of Appeals

For the Second Circuit.

FELIX MERCED and MODESTA MERCED,
Plaintiffs-Appellants,

against

AUTO PAK COMPANY, INC.,
Defendant-Appellee,

S & C LIQUIDATING CORP., AUTO PAK DIVISION OF FLINCHBOUGH PRODUCTS, DIVISION OF GULF & WESTERN SYSTEMS CO., ALBERT SHAYNE and ARTHUR CONTENT,
Defendants.

AUTO PAK COMPANY, INC.,
Third-Party Plaintiff,

against

SOUTHBRIDGE TOWERS, INC.,
Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

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(6515)

UNITED STATES COURT OF APPEALS
JUL 14 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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MR. ISAAC: I read that.

MR. IVONE: Low hydraulic oil?

MR. ISAAC: I read that before.

THE COURT: Is there anything else?

MR. ISAAC: Final question, your Honor.

Q Looking at that book put out by the manufacturer and sent to the purchaser, is there any direction in that book directing the user of the machine, the owner of the building, to keep that machine running 24 hours a day?

A I have not seen any.

THE COURT: Isn't it conceded there is nothing to that effect in the book?

MR. SHANDELL: Yes, I think it is.

THE COURT: You concede that, don't you, Mr. Ivone?

MR. IVONE: Yes, sir.

THE COURT: Thank you. You are excused.

(Witness excused)

THE COURT: Miss Stone and ladies and gentlemen, we will use this interval to take the afternoon recess. Ten minutes.

(Recess)

(Jury not present)

THE COURT: Are you ready with your next witness,

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Mr. Chandell?

MR. SHANDELL: Yes, your Honor.

MR. ISAAC: May it please the Court, may I have a moment of your time, sir?

THE COURT: What is the problem?

MR. ISAAC: I have spoken to fellow counsel in the case and in view of the conditions of the road as I understand them to be and the three or five inches of snow we had this morning, I respectfully ask the Court to adjourn at this time until tomorrow morning so that we can get a little bit of an advance move to our ultimate destination. Some of us have to travel a rather long distance.

THE COURT: What are you talking about? I don't understand the problem. Where do you have to go?

MR. ISAAC: I don't have the major problem. I am just a little ill at the moment. The other counsel indicated they have to go to Huntington, which is over two hours away by reason of the condition of the weather. I don't know where the jurors live, but I understand from the board they live some distance away. I did hear a report during the recess that traveling is extremely tiresome and lengthy this afternoon.

THE COURT: Thank you.

MR. SHANDELL: I seem to have a problem, your Honor,

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as I look around the courtroom.

THE COURT: What?

MR. SHANDELL: I seem to have a problem as I look around the courtroom -- never mind.

(Jury enters the courtroom)

THE COURT: Who is your witness, Mr. Shandell?

MR. SHANDELL: Mr. Merced.

MR. REGAN: Your Honor, I requested the opportunity to make an application in the absence of the jury regarding this witness.

THE COURT: I don't know what it is, but you will have to come up to the side bar.

Come up, Mr. Merced.

(At the side bar)

MR. REGAN: Your Honor, since this is a trial of liability only, I ask that your Honor caution plaintiff's attorney not to --

THE COURT: Mr. Regan, is this what you interrupted this trial for? You presume the worst. You presume that the Court is unaware of what's going on. You presume all kinds of things that I find a little bit less than impressive. Let us not waste any more time. I am aware of the point. I trust Mr. Shandell is. If he isn't, I will be alert to the problem. Henceforth, I wish you wouldn't

bore me with these irrelevant, nonsensical applications.

(In open court)

MR. SHANDELL: If your Honor please, Mr. Merced requires the assistance of an interpreter to give his testimony.

THE COURT: That is a matter which is your problem.

MR. SHANDELL: I have here somebody who can interpret for us. Can he be sworn, also?

THE COURT: Certainly.

(Eufemio Alvarez was sworn as the Interpreter.)

F E L I X M E R C E D, a plaintiff, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

MR. IVONE: If the Court please, let the record note the witness responded himself to the English oath. There was no translation. If your Honor please, may we inquire as to who Mr. Alvarez is?

THE COURT: He has just been sworn as an interpreter. If you have any occasion to doubt his capacity as such, at a suitable time when we have given a chance to everybody to proceed here, you may make your application known and I will rule on it then and only then.

Now let's go on.

DIRECT EXAMINATION BY

MR. SHANDELL (Through the Interpreter)

MR. SHANDELL: Mr. Alvarez, when I ask a question, will you translate it to the witness, take his answer back and translate it to the reporter, please?

THE INTERPRETER: Yes.

Q Mr. Merced, are you the person suing in this case?

A Yes, sir.

MR. IVONE: Now, your Honor, may I inquire at this point --

THE COURT: Inquire of what and of whom?

MR. IVONE: Your Honor, I am objecting to a translator who is not a member of the court-appointed staff.

THE COURT: We do not have a court-appointed staff for civil cases, number one. Number two, the only objection you could make is lack of competence in translating. That was the point I made a few moments ago. I rather doubt at this easy stage that you are in any position to make such an objection.

MR. IVONE: I don't know Spanish so it would be difficult for me.

THE COURT: I am pointing out to you that this Court takes judicial notice of the fact that this Court does not have, as you claim, an official staff of interpreters

for this kind of a case. It does not, it never has been in the years that I have practiced in the court as a judge and a lawyer and it does not today, February 5, 1975.

Go ahead, sir.

MR. IVONE: May I inquire, sir, whether there is any relationship between him and Mr. Merced? I don't know who this man is.

THE COURT: Again, we are not going to inquire about that now. If you have any basis for such inquiries, we will get to those later.

Proceed, please.

Q Mr. Merced, on July 13, 1972, were you working for Southbridge Towers?

A Yes.

Q What was your job that you were working at on July 13, 1972?

He worked as a porter.

Q As a porter, at that time what were your duties?

A During the time of his work as a porter, he have to clean the floors, clean the windows, mop the floors, clean the lobbies, clean the elevators, attended in the compactor, what they call the machine where the garbage is. General work.

MR. WILENSKY: May I ask the witness speak up? I

have some facility in Spanish. I would like to hear his answers.

THE COURT: I would agree with you, Mr. Wilensky. In fact, I would ask two things. First of all, Mr. Merced, if you could speak out to the back of the room, sir, the accoustics here are relatively poor.

Second of all, Mr. Alvarez, if you could speak out a little more, too. I am afraid it is hard to hear under the best of circumstances.

THE INTERPRETER: Just now the Judge speak to Mr. Merced he speak more clearly so it could be heard by all of you.

MR. SHANDELL: Mr. Alvarez, you, too.

THE INTERPRETER: I will do.

Q With respect to the compactor machine, Mr. Merced, what were your duties?

A I have a stick in my hand.

THE INTERPRETER: Excuse me. I could be better interpreter because when he talk it will create a lot of confusion.

A I have stick in my hand. I was using to remove the garbage that was coming from up.

Q Did you have any other duties with respect to the compactor machine?

A Yes.

Q What?

A I have to take out the garbage in the bags, tie the bags, put new bags on and stay there watching the machine so the machine will not get stuck.

Q On July 13, 1972, what time did you get to work?

A Eight o'clock.

Q And when you got to work after you started work, what is the first thing you did?

A I started the machine.

Q Is that the compactor machine?

A Yes, sir.

Q After you started the compactor machine, what is the next thing that you did?

A I started to take out the bags, tie them, put in more bags and take the stick and start bringing the garbage down from the machine.

Q For how long did you stay there taking the stick and start bringing the garbage down from the machine?

A Two hours.

Q If you didn't stand there taking the garbage down from the machine, what would happen?

MR. IVONE: Objection, your Honor.

THE COURT: Yes, sustained.

Q Did you have any experience as to what happened in the machine if you didn't stand there with the stick taking the garbage down?

MR. IVONE: Objection.

THE COURT: Among other points I want to make to you, Mr. Shandell, in making that ruling, first let's get what happened on the day in question. Then we can perhaps go further, but not now. We are waiting to find out. We have been waiting now to find out what happened. You see?

Q On July 13, 1972, Mr. Merced, did you have an accident where you lost your right arm?

A Yes.

Q What time did the accident happen?

A At 10:00 a.m. in the morning.

Q Tell the Court and jury what happened.

A He says he grabbed the stick in his hand --

MR. ISAAC: I can't hear, your Honor. It is most important to hear this.

Q Talk louder.

THE INTERPRETER: I catch a bad cold.

A He say he grab a stick in his hands and start breaking the garbage that was jammed there in the machine. When he was trying to break the jam, a big piece of wood came down and stuck the machine.

Q What happened next?

A I reached with my hand to take out the piece of wood.

Q What happened next?

A When I reached the wood to bring him out, a bottle hit him in the front here.

Q What happened next?

A He became dazed.

Q What happened next?

A A bunch of garbage came down into his hand, the hand came all the way down to the ceiling.

Q What happened next?

A He says that he was so dazed that he couldn't remember after the machine grabbed his hand what really happened.

Q Did you ever, Mr. Merced, that day at that time reach down into the cylinder to take anything out of the cylinder?

A No, sir.

Q Where was the piece of wood that you were reaching for?

A He says the piece of wood was laying down like in the ramp there, a place that is like a slide plate, something like that.

MR. IVONE: I couldn't understand what that word is.

THE INTERPRETER: He says the piece of wood was stuck in there in the machine like slide down. It was sticking there.

Q Now, sir, had you been working at that compactor machine in the months before July 13, 1972, when you got hurt?

A Yes.

Q Had anything ever come out of that machine at you before?

A Yes.

Q Had you ever been hit by something coming out of the machine before?

A He says that one time a barrel came down was broken that slashed one part of the arm.

Q Did you tell anybody about it?

A He spoke about it to Mr. Nelson.

Q Now, Mr. Merced, when you put your hand in to take but the piece of wood, did you turn off the switch?

A No, sir.

Q What was the reason that you didn't turn off the switch before reaching your hand in to take out the piece of wood?

MR. ISAAC: I object to that question, sir, the form, substance.

THE COURT: No, I will allow him to give a reason, for whatever it is worth.

A The reason why I don't do it is because if I try to stop the machine the piece of wood that is stuck right there in the machine --

MR. IVONE: What?

THE INTERPRETER: The piece of wood is stuck in there, the piece of wood that is stuck, that is creating the jam, whatever you call.

A -- would create a kind of problem that could break the machine. That was one of the reasons he doesn't put off the machine.

Q Did you have any instructions, Mr. Merced, about what to do about pieces of wood or other things that were coming down from the chute down into the machine?

A Yes, sir.

Q What were the instructions?

A Take out wood, iron, carpet, big barrels of wine, barrels, you know, objects, rugs.

Q Were you given a reason why you should take these objects out of the machine?

MR. ISAAC: Objection.

THE COURT: I will sustain that as to form. I will certainly allow you to ask what was said to him.

Q What was said to you, if anything, about the reason that these --

THE COURT: That isn't what I said, Mr. Shandell.

I will allow, without any editorializing, him to say what was said to him, if he can recall, when he received these instructions.

MR. IVONE: And may we learn from whom, your Honor?

THE COURT: In due time I trust we will. Let's proceed a pace, if you don't mind.

Q What was said to you about this when you received these instructions?

A They have to take out carpets and pieces of pipes, wood, wire, barrels of wine, bottles, pipes and rugs.

MR. SHANDELL: I have no further questions.

THE COURT: All right, Mr. Ivone.

THE INTERPRETER: Your Honor, I would like because I have to work with him slow and, and anybody who make -- bring out big questions, for me is easy to be an interpreter to bring out the right word, if they go too fast when I catch everything it create a problem for everybody. He speak Spanish. He know what I mean.

THE COURT: If you have trouble with a particular question from anybody, you just say so and we will act accordingly.

THE INTERPRETER: Thank you.

THE COURT: All right, Mr. Ivone.

CROSS EXAMINATION

BY MR. IVONE:

Q Those instructions you were just telling us about, by whom were they given?

A Mr. Nelson.

Q Just exactly what did Mr. Nelson say?

A That he have to take out anything that could break the machine, rugs, barrels, pieces of wood, carpet.

Q And who else was there when Nelson told you this?

A Mr. Mike Herman.

Q And was anyone else there besides Nelson and Mike Herman?

A The foreman.

Q Who is that?

A Mr. Christopher or Cristobal Sulliverez.

Q And who was it that was doing the talking?

A Mr. Nelson.

Q Did Mr. Sulliverez say anything?

A Yes.

Q What did he say?

A Mr. Sulliverez gave him instructions because he don't speak English.

MR.ISAAC: I didn't hear the last answer. May I have it repeated?

THE INTERPRETER: Mr. Sulliverez gave to Mr. Merced instructions in Spanish because Mr. Merced don't speak English.

Q And did Mr. Sulliverez in Spanish ever tell you to put your hand in that machine while it was operating?

A No, sir.

Q Did Mr. Nelson ever tell you to put your hand in the machine while it was operating?

A No, sir.

Q Did Mr. Herman ever tell you to put your hand in the machine while it was operating?

A No, sir.

Q Were you here when Mr. Melendez was testifying yesterday?

A Yes.

Q And did you hear Mr. Melendez say that he doesn't put his hand in there, he puts the stick in there, did you hear him say that?

A He says he cannot really explain to you because

he don't speak English.

Q I see. Did your attorney or anyone else explain to you what he said yesterday?

A No, sir.

Q When did you start working at the Southbridge Towers?

A March, 1971.

Q And did Mr. Melendez also work there at that time?

A Mr. Melendez started working in May.

Q Mr. Melendez has told us yesterday that he started working there in July.

A He really, because it my understanding of the English, he really don't know exactly when Mr. Melendez started working for the company.

Q So that you were working there for a period of at least three months before he started?

A Yes, sir.

Q And during that time what building were you working in?

A During those three months he was working in different buildings because he was on a test, shoved around where they have to learn the work.

Q So for three months from March to June, 1971, you

were there on approval, is that it?

A Yes, sir.

Q Now, from July, 1971, when Mr. Melendez came, up until January of 1972, he has told us that you were there in building number six, is that correct?

THE INTERPRETER: Mr. Ivone, I want you to give the question one-half and then the other half. I could create a problem.

THE COURT: Slow down.

(Question read)

A Yes, sir.

Q And in building number six there was also a compactor?

A Yes, sir.

Q And you worked in that building -- withdrawn. You worked with that compactor?

A I start working in the building, not in the compactor.

Q Mr. Melendez told us yesterday that you worked with the compactor during that time.

A No, sir.

Q Are you telling us, then, that Mr. Melendez was wrong?

A Yes, he was wrong.

Q Well.

During that period of time did you see the compactor

A Yes, sir.

Q And was there anyone else there, any other porter, in that building?

A Yes, sir.

Q Who was that porter?

A He don't recall his name. It was an American fellow.

Q Did you ever talk to Luis Rivera?

A Yes, sir.

Q Luis Rivera speaks Spanish?

A Yes, sir.

Q And did Luis Rivera tell you to handle the compactor?

MR. SHANDELL: When?

MR. IVONE: We will find out if he answers yes. I don't know.

THE COURT: One thing at a time.

Q Did Luis Rivera tell you to handle the compactor?

A No, sir.

Q Who told you to handle the compactor?

A During the period of three months he was watching, looking, seeing how people work this compactor machine because

he don't receive during those times any instructions how to work the compactor machine.

MR. IVONE: I move to strike the answer as not responsive.

THE COURT: Yes, I will ask the jury to disregard that answer.

However, once again keep in mind, particularly now, Mr. Ivone, that Mr. Alvarez says speak slowly and, if you can, break down the question so he can break them down for purposes of translation.

Start over.

Q Who told you to work the compactor?

A Mr. Sulliverez.

Q And he was the foreman?

A Foreman.

Q What did he tell you?

A Mr. Sulliverez bring him to the compactor machine. He says he don't receive instructions.

Q When he took you to the compactor machine, what did he say?

A When Mr. Sulliverez took him to the room where the compactor machine is located, he told him to start working the compactor machine.

Q Well, by that time you had been there from March

until June when you were on approval?

A From March -- no,sir, he says, from March until May.

Q And then from May until January, let's say, of 1972, you were still there working in these various buildings, is that correct?

A He says that -- he says no, and during the time of May up to July, the period of July, he went to Puerto Rico.

Q From May, 1971, until July, 1971, you went to Puerto Rico, is that correct?

A Yes.

Q And then from July, 1971, to January, 1972, you were working in building six?

A I was in Puerto Rico six months.

MR. IVONE: Five.

"Cinco" is five.

THE INTERPRETER: Five.

Q Didn't you tell us you were in Puerto Rico from May until July?

A No, sir, from July until December he was in Puerto Rico.

Q Didn't you just tell us that Mr. Melendez was correct, that you were working there from July until January?

A He says he was from July until December in Puerto

Rico.

Q Do you mean, then, Mr. Melendez, when he was testifying yesterday that he saw you every single day for lunch from July until December or January, that that was not true?

A He said that the reason that Mr. Melendez --

THE INTERPRETER: He bring the word -- so long the question, that I get mix up between both of you.

It confuse me. He confuse me already.

A He says that during the time of July and December, during those five months they don't see each other because Mr. Melendez didn't know where he was. He was in another building. That is what Mr. Merced says.

Q Mr. Merced, Mr. Melendez told us yesterday that he saw you every day.

A I keep telling to you that I don't speak English.

Q Mr. Melendez speaks Spanish, doesn't he?

A Mr. Melendez speaks Spanish, he don't speak English.

Q And he spoke English here yesterday.

A Yes, sir.

Q During all this time that you were there, whether it was building six or building seven and you saw these compactors did you ever work them before you were given

charge?

A No, sir.

Q During all that time, were you watching the men how they worked them?

A I was watching. This is the way I knew how to operate those machines.

MR. ISAAC: Excuse me, counsel. The voice dropped at the end. I didn't hear the answer. May I please have it repeated?

THE COURT: Yes.

(Answer read)

Q Did you watch Mr. Melendez operate the machine?

A No.

THE COURT: Would you, Mr. Ivone, object if we were to quit a little early in view of the weather condition. et cetera?

MR. IVONE: I would appreciate it, in fact, your Honor.

THE COURT: Miss Stone, ladies and gentlemen, we will suspend now until tomorrow morning. A couple of points.

Although I had originally thought the case would not last so long, it may well be that we will not finish tomorrow. So I should point out to you that we will not sit

in this case on Friday. The reason for that is because my schedule requires me to be doing other things than this case on Friday and, indeed, on all Fridays.

I believe, just to give you a rough progress report that the plaintiff is pretty much coming close to the end of his case on the issue of liability here. Am I fairly stating the matter?

MR. SHANDELL: A fair statement, your Honor.

THE COURT: That will give you an approximate idea of how we are doing.

Now let us hope the weather is not as bad as it has been advertised and we will see you tomorrow morning at ten o'clock. Good evening.

(Jury leaves courtroom)

MR. REGAN: Your Honor, I would like to put something on the record.

THE COURT: What is it you would like to place on the record, Mr. Regan?

MR. REGAN: I would like to put on the record during the direct testimony of the plaintiff he removed the sock and showed the jury the stump of his hand, which is exactly what I was protesting in advance about.

THE COURT: I might say that for the two or three days we have been here he has done that every day

with consistency as he sat behind you. You haven't been able to see it, I assume. If you feel that this is some kind of thespian approach to the problem, may I remind you that experience teaches that that kind of thing usually, although, of course, we can't be sure, boomerangs. If you are asking me conversely to tell him to keep the sock on his bandage, on the stump, that's another thing.

Is that what you are asking me to do?

MR. REGAN: That is what I was going to request, your Honor, but I think it is too late at this point.

THE COURT: I leave it up to you. I have noticed this before. I have noticed a few other things, I might say, too, but you couldn't see those because your back is turned. I think at the moment one could say that maybe you shouldn't be complaining. Who knows? If you want to make an issue of it, I will ask Mr. Shandell to instruct his client to keep his right hand in the condition he usually keeps it in. You think about it.

Mr. Isaac, I may owe you an apology because I think you said something which I didn't catch. Did you try to tell me that you were ill? I was focusing on your weather report. It occurs to me I may have overlooked something. Did you say you were ill?

MR. ISAAC: I woke up in that condition.

THE COURT: What is your illness? Do you care to offer a diagnosis?

MR. ISAAC: Would you like me to give you a lawyer-like or medical diagnosis?

THE COURT: I assume you are not a physician. What do you think you have?

MR. ISAAC: I think I have a common cold, sir, with a slight elevation of temperature, which has annoyed me constantly during the day.

THE COURT: Go home, take liquids, aspirin and rest. See you tomorrow.

MR. ISAAC: Thank you, Dr. Tyler.

MR. WILENSKY: Your Honor, I suggest that remedy doesn't work. I tried it last night.

(Adjournment until 10:00 a.m. February 6, 1975.)

FELIX MERCED

vs. 73 Civil 1621

AUTO PAK et al.

February 6, 1975
10:00 a.m.

(Trial resumed - jury present)

THE COURT: Good morning, ladies and gentlemen.

Mr. Alvarez and Mr. Merced, are they ready?

F E L I X M E R C E D, resumed.

CROSS EXAMINATION CONTINUED

BY MR. IVONE (Through the Interpreter)

Q I believe you told us yesterday that you were more or less on approval for about three months.

A Yes.

Q And during that time that you were on approval for three months, with respect to the compactor what did you do?

A Well, I was watching the way the boys were working and I see the way that they manipulate the machine.

Q Did you ever ask any questions?

A No, sir.

Q So that for about 90 days you were watching them operate the compactor and you never asked them a single question about what to do?

A No.

Q And in these 90 days that you were watching them, how they operated the compactor, nobody told you what to do?

A No, because --

MR. IVONE: I move to strike the because, your Honor, just yes or no.

THE COURT: You got the answer. Next question.

THE WITNESS: No.

THE COURT: Next question, Mr. Ivone.

Q Mr. Merced, were there certain switches on the compactor?

A Yes.

Q What switches were on there?

A There was a switch on the wall, on the right side of the machine another one, on the right side of the machine in a secret way is a reverse way and a magic eye.

Q So you told us now about four, is that it?

A Yes.

Q Did you ever use the switch to turn the machine on or off?

MR. SHANDELL: Objection, your Honor. Which switch?

THE COURT: I think that is an appropriate change.

MR. IVONE: Very well.

Q Did you ever use the switch on the wall to turn the machine on or off?

A He says he don't remember.

MR. ISAAC: Again I must interrupt only because I can't hear.

A He says he don't remember.

Q Now, do you know what the switch was for on the wall?

A Yes.

Q What was it for?

A To turn completely off the machine.

Q And when you say "completely off," do you mean that the electricity would be turned off?

A Yes, total.

Q When you were telling us about the other switches on the right side of the machine, are you having in mind that your back is towards the machine so the switches would be on your right?

A Not on the back.

Q I show you this picture which is Figure No. 1. That is a picture that your attorney offered into evidence. Is that the machine where you hurt yourself?

A Yes.

Q Now, as you look at that machine -- please look at it, sir.

THE INTERPRETER: Give it back to him?

MR. IVONE: Yes, if you will.

Q As you look at that machine, there are controls on the left as you are looking at it. Are those the controls you were talking about before?

A Exactly.

Q So that as you are looking at the machine the controls would appear to your left, is that correct?

A Exactly.

MR. IVONE: All right, he can put it down now.

THE INTERPRETER: Do you want me to give it to you?

(Photographs handed to Mr. Ivone.)

Q You told us something about a switch to put it into reverse. What was it that went in reverse?

A He says it was a secret switch, he never knew about it in the machine.

Q A secret switch?

A Yes, sir.

Q What kind of switch was it?

A He says he could explain to you and show you better by pointing out on the picture of the machine.

Q All right. Here is the picture.

MR. IVONE: May I approach, your Honor?

THE COURT: Yes.

MR. SHANDELL: May I approach, your Honor?

THE COURT: Yes.

(Witness indicates)

A Right below in this section.

Q Is that little thing sticking out and there is a line drawn here which says M --

A That's where the K is.

Q Where the K is?

A Yes.

MR. IVONE: May we simply show the jury, your Honor, what he is talking about?

THE COURT: Yes.

MR. IVONE: The witness has indicated that portion where I have my hand and there is a line drawn with a K. That would be the switch he is talking about.

Q You said that switch was secret?

A Yes.

Q But you told us that it was something to make something go in reverse?

A Yes, sir, that is the same switch.

Q What is it that would go in reverse? That is

what I am trying to find out.

A The machine has like a button that make the machine go in reverse.

Q So then it is a button that you have to press?

A He says he didn't push it down, the foreman did it.

Q You saw the foreman do it?

A Many times I saw him.

Q And when he pushed the button down, what did you see go in reverse?

A The cylinder.

Q When you talk about the cylinder, are you talking about the ram or the piston?

A The part that we call the ram, the part that push the garbage into the machine.

Q That part that pushes the garbage into the machine, is that it?

A Yes.

Q So we have it absolutely clear, the part that pushes the garbage into the bag?

A Yes, sir.

Q And that's the same part that caught your hand, that cut your hand off, isn't it?

A Yes, that is the same part, the cylinder.

Q Now, you told us there was another switch on there. Was that the switch to turn it on and off?

A He says yes before, and that is the switch to put it in and off.

Q Did you turn that switch on in the morning?

A First thing he do pull the switch on the wall, the wall switch.

Q First you put on the wall switch and then after you put on the switch that's on the machine?

A No.

Q Did you ever put the switch on on the machine, on the left side of the machine?

A Yes, sir, I put it to work.

Q And you would do that every morning, wouldn't you?

A He says when he start he put the switch on that is on the wall.

Q How about the switch on the machine, would you also put that on?

A He says that he didn't put the switch on to work because that machine have an electric eye that when the garbage go in the machine it start working by itself.

Q You just told us that one of the switches on the side of the machine turns the machine on and off.

A Yes, sir, it put the machine on and off.

Q And did you use that sometimes?

A Yes.

Q So there were times that you used the switch on the machine to turn it on and turn it off?

A Yes, there is a time when there is not enough garbage or the magic eye don't work, he did it.

Q Did you ever use that button on the machine to stop the machine from working?

MR. SHANDELL: Objection, your Honor. Which button?

MR. IVONE: The one on the machine, the one that stops it on the machine.

MR. SHANDELL: You talked about two things. You talked about the reverse button and the switch.

MR. IVONE: I am not talking about the reverse. I am talking about the button that stops it.

THE COURT: Go ahead. It is perfectly permissible.

Q May I have the answer, please?

A He says in the morning or in the afternoon?

Q Well, let's say both.

A I have to operate that machine twice a day.

Q When you stopped operating it, did you shut the machine by turning the switch or button on the machine?

A When I stopped working the machine, I used the switch that is laying in the wall.

Q Do you recall testifying on May 5 -- I am sorry -- on May 8, 1974, at the office of your attorney?

A No, sir, I can't remember.

Q You don't recall that you were testifying at two o'clock in the afternoon?

A He says he don't recall that he was testifying yesterday.

THE INTERPRETER: He don't understand the question.

Q Do you recall sometime last year you testified, some lawyers were in an office and they asked you questions?

A Yes.

Q And you swore on that day that you would tell the truth?

A Yes, I swore.

Q And do you recall that there was someone translating for you?

A Yes.

MR. IVONE: Page 33, line 17. I will take it from 14.

Q "Q Did you ever use the wall switch to turn the machine off?

"A Yes, I used it."

Did you give that answer to that question?

A He said he don't remember.

MR. IVONE: Will counsel concede that he gave that answer to that question?

MR. SHANDELL: I will concede that answer was given to that question.

Q Next question.

"Q Would there be any reason for you to use the button on the machine instead of the wall switch?

"A I used the button only on the machine to stop the machine from working."

Did you give that answer to that question?

MR. SHANDELL: I concede that answer was given.

A He said to whom I gave it?

Q To whom?

THE INTERPRETER: Yes.

Q When you were testifying, that was your answer, wasn't it?

A He says which time that he was testifying.

Q The time that we just described, in May of last year.

A In May, 1974, I was not working.

Q Were you not at the office of your attorney answering questions, a lot of lawyers were there?

A Yes.

MR. IVONE: And it is conceded he gave that answer?

MR. SHANDELL: It is conceded he gave that answer.

MR. IVONE: I just heard a whisper there is a language barrier. Can we understand the witness is being addressed in Spanish, and that is his language?

THE COURT: I don't understand you, Mr. Ivone. What are you asking me, whether or not he and the interpreter are speaking Spanish?

MR. IVONE: There was a remark just made that there is a language barrier. I am suggesting, your Honor, can we understand it that he is being addressed in Spanish. Therefore, there is no language barrier as to him.

THE COURT: I don't know what you are talking about, frankly. Why don't you go ahead with your next question.

Q "Q . And for what reason would you stop the machine from working?

"A When was no garbage."

A Yes.

Q So you gave that answer to that question?

A Yes.

Q "Q Did the machine go on by itself?

"A The machine I turned it on and off."

Did you give that answer to that question?

A Exactly.

Q You told us something about a magic eye.

A Yes, sir. When there is nothing in the machine, the magic eye would make the machine go on, work.

Q Would make the machine go or make the machine stop?

A Stop.

Q Now, when all the switches were turned on, the one on the wall and the one on the machine, and garbage came into the machine, then the magic eye would make the machine go?

A Yes, sir.

Q Was that because some garbage and objects would go in front of the magic eye?

A Yes, sir, across the machine.

Q You told us yesterday about a stick that you used.

Q Yes.

Q Did you have to go upstairs to one of the floors upstairs to push the garbage down with the stick?

A No, sir, just from the inside, up.

Q On that day, the day of the accident, did you ever

say that there were two floors of garbage?

A Yes, sir.

Q And did you ever say before that you had to go upstairs to push the garbage down?

MR. SHANDELL: Objection, your Honor. The previous question was push the garbage down with the stick.

MR. IVONE: With the stick.

THE COURT: Let's help Mr. Alvarez put the question again.

Q Did you ever say that you had to go upstairs to push that garbage down with your stick?

A No.

Q Page 41, line 19.

"Q Was there a chute which led from the floor above down to the machine?

"A Yes. It had two floors full of garbage."

You gave that answer to that question?

A Yes.

Q "Q How many floors were there in this building number seven?

"A There were seven floors in building number seven."

A Seven floors they have.

Q "Q How did you know there were two floors of

garbage in the chute?

"A Because I had to go upstairs to push the garbage down."

MR. SHANDELL: He doesn't say push the garbage down with a stick.

MR.IVONE: Oh, now.

Q Did he give that answer to that question?

A He said I went up but in no ways I push down the garbage -- he didn't push it down.

Q He didn't push it down?

A Yes.

Q You didn't push it down?

A No.

Q Next question.

"Q Was it your practice to push the garbage down from upstairs?"

A No (In English).

Q Now we have heard he said no. Let me read the answer.

"A Yes, since I am working this, yes, but that day I couldn't push it down."

Did you give that answer to that question?

A No.

Q You didn't give that answer to that question?

MR. SHANDELL: I concede that that answer was given.

A He says no.

Q I believe you told us that you were reaching in for a piece of wood when the accident happened.

A I reached for the stick that was crossing the machine.

Q All I am asking is just a simple question.

How long was that stick?

About three foot.

Q Did you ever say it was ten inches?

A No.

Q That was a 2 x 4 piece of wood?

A Yes, sir.

Q Page 46, please, line 15.

"Q Now, how long was this 2 x 4 piece of wood?

"A . It was about ten inches long."

Did you give that answer to that question?

A No, he says.

MR. IVONE: Will it be conceded he gave that answer to that question?

MR. SHANDELL: We will concede that is the recorded answer.

Q Well, that machine, could it chop up wood?

A I don't know.

Q Did you ever say that it could chop up wood?

A No, sir.

Q Did you ever say that it chopped up your hand and it could chop up wood?

A N , sir.

Q Page 59, line 5 -- well, I will take it from a little before so we will understand the continuity. Page 58, line 3 -- before I do that, I will withdraw that for the moment.

Did that cylinder or ram have teeth on it?

A Yes.

Q And those teeth were about two, two and a half inches long?

A I never have time to measure those teeth.

MR. IVONE: Will counsel concede that on page 58 he gave an indication as to the size and it was agreed that it was approximately two and a half inches?

MR.SHANDELL: I will concede that apparently in response to a question about how many inches was the teeth he made some indication with his hands and counsel there estimated the indication with his hands at two and a half inches.

MR. ISAAC: If your Honor please, I believe it is appropriate at this time to indicate for the record, sir, I would ask for a concession, that my client was not present at this examination, we were not parties to the action at that time and when any reference is made to counsel or to questions and answers at that examination before trial, it doesn't include my office or my client in this case. May we have that for the record, sir.

MR. IVONE: From my point of view, I will agree to that. It was Mr. Katz, attorney for the plaintiff, who estimated the two and a half inches.

MR. SHANDELL: Apparently Mr. Fried did the same.

MR. IVONE: He agreed with him.

MR. WILENSKY: May I make the same comment as Mr. Isaac with reference to the participation of my client in the examination before trial, that we were not parties at that time.

MR. REGAN: None of us were, if the Court please.

Q Now let's go to page 59.

"Q These teeth were on the part of the machine that moved?

"A These teeth destroy or cut up garbage."

Did you give that answer to that question?

A Yes, he gave the answer.

Q "Q Could these teeth chop up pieces of wood?

"A Well, if it destroyed my hand why wouldn't it chop up wood, too."

Did you give that answer to that question?

MR. SHANDELL: I concede that the answer was given as recorded.

A He says he don't recall, he don't remember.

Q When you say that you were pushing garbage with the stick and you told us yesterday that you were at the door of the machine, were you standing on the floor or were you standing on the machine?

A The machine have no stand to stand on.

Q You mean you were standing on the floor?

A Yes, on the floor.

Q Did you open the door?

A Yes.

Q And when you were pushing with the stick you were pushing upwards?

A Yes, up.

Q And when you were doing that, was your hand inside the machine?

A Yes.

Q And at the time the bottle hit you in the head you

were outside the machine?

A I was pushing up with the stick the garbage when the bottle hit him.

Q And you were pushing the garbage that was up in the chute to make it come down, is that it?

A That's the way he was working with the stick, breaking the garbage when the bottle came down.

Q Indicating upward?

A Yes, up.

Q And the bottle came down and hit you on the head?

A In the forehead.

Q And your head was outside the machine?

A My head was in the position when I have the stick, in that position (indicating).

Q Was your head outside the machine?

A I was in the position that when I was breaking with the stick the garbage, my body, part of the body, or the head, was inside the machine, when he was reaching for the wood and the bottle hit him and the garbage came down at that moment that took the -- that lowered the hand and down to the cylinder of the machine.

Q You just told us, Mr. Merced, when the bottle hit you on the forehead you were with the stick poking the

garbage upward.

A Exactly. That's the way he was trying to poke the garbage.

Q So then when you were hit by the bottle your hand was not going and reaching for the 2 x 4, was it?

A I was in the position with my hand reaching for the piece of wood that was making an obstruction of the garbage, what you call a jam or whatever you call.

Q Mr. Merced, you couldn't be pushing with two hands upwards and reaching at the same time in for the 2 x 4 at the time you were hit by the bottle?

A He says he could do it because he was in the position he could use the stick to remove the garbage and reach with the other hand for the stick that was creating the jam of the machine at the same time.

Q Didn't you show to this jury just now that you were using two hands pushing up at the time you were hit by the bottle?

A He says he was using the two hands and he says when the piece of wood came down in this sliding piece of metal in the machine.

Q But that is when the bottle hit you?

A It was in the time that he tried to reach the wood that the bottle came and hit him in the forehead.

Q Did you just tell us a moment ago that with one hand you had the stick pushing up and the other hand you were reaching in to pick up the 2 x 4?

A I was trying to poke out the garbage. The garbage was not coming down. But the moment that the piece of wood come down, he reached with the hand to take it out and the bottle come and hit him in the forehead.

Q And you lost consciousness, didn't you?

A I was in a state of daze.

Q I didn't ask you whether you were in a state of daze. Did you lose consciousness?

A We use the word "daze" because daze in Spanish is what he call atandado, which means daze. That is a state of daze.

Q Did you ever say that you lost consciousness? Just yes or no.

A Yes, yes.

Q You did lose consciousness?

THE INTERPRETER: He just refer I am in a state of daze. I was very sick at the moment of the accident because of the accident.

Q Page 47, line 15.

"Q Did you hear the noise of the machine?

"A No. A bottle hit me in the head and the

rest of the garbage went on my right arm and I lost consciousness and I lost control and I couldn't take the stick out. When I tried to pull out the stick the way I was feeling I put my hand to get the stick and when I tried to take my arm out it was too late because my five fingers were already gone."

Did you give that answer to that question?

A Exactly.

Q So that you were knocked unconscious?

A He keep telling that he don't was unconscious, he was dazed.

Q Now, you told us that you reached into the machine to get a stick, the 2 x 4.

A Yes, sir.

Q And when you reached in there, the machine was working.

A Yes, sir.

Q Before reaching in there with the machine working, did you stop the machine?

A No, sir.

Q Did you walk around to where the panel was to throw the switch?

A No, sir, I couldn't.

Q You couldn't or you didn't?

A I couldn't.

Q Was there something stopping you from turning off the switch?

A Yes.

Q What do you say stopped you from turning off the switch?

A I was alone in the building. I was working at the machine. The piece of wood was there, stuck in there. In the time that that wood was there, he was afraid the machine would be broken, he have to finish his work and he was working with that machine.

Q Were you in a hurry?

A No, sir.

Q The switch was not far away, was it?

A He says it was a little far out, that he have to make a run and go to put out the switch and stop the machine from working.

Q You would take two or three steps and stop the machine?

A He says at that moment he could not think of everything because he have order to take out the pieces that come down to that machine, wood, glass, barrel, carpet, rugs, whatever is coming there that create the type of jam and that's why.

Q Did the foreman or whoever it was ever tell you to reach your hand in there while the machine was working?

A Mr. Nelson told him that he have the right to take whatever create - that could damage the machine, whatever goes there. Mr. Nelson.

Q Mr. Nelson told you that?

A Yes, sir. He is the big boss.

Q You understand Mr. Nelson?

A No, by an interpreter.

Q And he told you to do this and not stop the machine first?

A The interpreter who was the interpreter for Mr. Merced from Mr. Nelson says to Mr. Merced that he have to take care of that machine because he have to take everything out that could jam or break the machine.

Q Did you ever say that there was nothing to prevent you from stopping the machine?

A Yes, sir.

Q As a matter of fact, you said that last year, didn't you?

A Last year I was not working in that machine.

Q Page 62, line 12.

"Q Did anything prevent you from turning off the machine before the accident happened?

"A No. I was working then."

A He says no.

Q As a matter of fact, this story that you have just told us, isn't this the very first time you have ever testified to such a thing --

MR. SHANDELL: Objection, your Honor.

Q -- that you were told by Mr. Nelson that you must get these sticks out of the machine and that you can't stop it first?

MR. SHANDELL: Objection, your Honor.

THE COURT: Just a moment.

First you, sir.

MR. SHANDELL: I object to that question, your Honor.

THE COURT: And you, Mr. Isaac.

MR. ISAAC: I object. Do you want me to state the ground, Judge?

THE COURT: It might help.

MR. ISAAC: I object on the ground that the witness didn't say that Mr. Nelson told him to take anything out of there with the machine working.

THE COURT: In any event, I am going to sustain the objection on several grounds. To begin with, Mr. Ivone, this is four questions rolled in one. I know you are trying

to help the interpreter but I think we can only proceed one thing at a time.

I also might mention to you that you could help us all if you make it clear that you mean is this the first time at this trial or are you talking before this trial.

MR. IVONE: I am talking about this trial, the first time.

THE COURT: Let's all understand this, not just Mr. Merced. Proceed to reframe the question.

Q You have told us that Mr. Nelson instructed you to remove all large objects.

A Yes, sir.

Q And that you had to remove them so that the machine wouldn't get damaged.

A Yes, sir.

Q And you have also told us now that was the reason you didn't stop the machine.

A That is a reason.

Q Isn't this the first time since the accident happened that you have told such a story?

MR. SHANDELL: Objection, your Honor.

THE COURT: Again, I am going to allow this, but I call to your attention certain matters which occurred late yesterday afternoon. I don't regard my recollection as

infallible, but I do remember an answer he gave yesterday.

MR. IVONE: I mean prior to the trial.

THE COURT: That's what I insist you make clear. It is quite a distinction.

MR. IVONE: I am referring to prior to the trial.

THE COURT: Let's help us all out. Whatever else you are objecting to, Mr. --

MR. SHANDELL: May I state the ground for my objection?

THE COURT: You certainly may.

MR. SHANDELL: If Mr. Ivone is referring to the deposition or some other testimony that may have been given in this case, then Mr. Ivone in accordance with proper questioning should point to some contradictory statement in that testimony, not ask the witness whether he ever said something that he may never have been asked.

THE COURT: That may be, but you are free to get into that part later.

Do you understand? Let's go ahead.

Q Let me read from the examination before trial again.

Page 62, line 2.

THE COURT: Can we move along, gentlemen? We are wasting an awful lot of time. Go ahead.

Q "Q Isn't the switch on the side of the machine capable of turning the machine on as well as turning it off?

"A It is to start and to stop, yes, but I could not stop it, I could not turn it off."

Did you give that answer to that question?

A Yes, sir.

Q "Q Now, when you say you could not stop it, what prevented you from stopping the machine?

"A I could not turn it off because I was dizzy and all of the blood was running out of my arm."

Did you give that answer to that question?

A Yes.

Q So in May of 1974 you didn't tell us that you were unable to shut the machine because you were in a hurry to get this stick out as it might damage the machine?

MR. SHANDELL: Objection, your Honor.

THE COURT: I am sorry. Are you objecting to the interpreter?

MR. SHANDELL: I object to Mr. Ivone's question.

THE COURT: I am sorry. I have been listening to the answer for sometime.

MR. SHANDELL: I didn't hear the answer. I have been listening to the question. I tried to allow the

question to get on the record before I made my objection.

THE COURT: It is late. I am going to let it stand because I have been listening to the answer for some minutes here.

The answer isn't complete, let's go back. Can we help Mr. Alvarez where we were interrupting here?

Mr. Ivone, you are the questioner here. I am not talking idly.

MR. IVONE: I didn't think you were talking to me. I thought you were asking the reporter to read back.

THE COURT: I am alerting you I am talking to you. You are the cross examiner. Under the system you have the floor. When there are interruptions the judge has to rule. That doesn't mean you immediately go into a feud thereafter. Pick up the thing you want. Repeat it and we will get it. It is very difficult when you are dealing with an interpreter under the best of circumstances.

MR. IVONE: I am not quarreling with that. I didn't know you wanted me to repeat the question. I will repeat it.

THE COURT: Exactly.

Q Back in May of 1974, when you testified, you didn't tell us then that the reason you couldn't stop the machine was because you were trying to get the stick out

to prevent damage to the machine?

MR. SHANDELL: Objection.

THE COURT: Overruled.

A Exactly.

Q Did you have a certain length of time that you had to do your job with the compactor?

A Yes, I have the time of two hours.

Q Well, had you finished the job?

A No.

Q You got there at eight o'clock in the morning?

A Yes.

Q And the accident happened about 9:45 or ten?

A 10:00 a.m.

Q So that you had already been working there two hours?

A Yes, I was working two hours and I have two floors of garbage.

Q Was there a reason why you had only two hours to do the job?

A He said the reason he have the two hours, he have to take care of that machine, taking care of the garbage, tying it up, putting it out, that is his work, that is the reason.

Q Was the purpose because you had to make the

elevators free for the tenants?

A The tenants have the time of a half hour to come down through the elevator.

Q What was that? I don't understand that answer.

THE INTERPRETER: Mr. Merced said the tenants have a half hour to come down -- for use of the elevators.

Q And when they are using the elevator you can't be working with the garbage, is that it?

A No, I working the machine.

Q Page 55, line 16.

"Q So that ordinarily you worked for two hours on the compactor, is that right?

"A I had an hour and a half to work on the compactor but many times there is lot of garbage I had to stop at that hour and a half. So then from 9:30 on I had to give the elevator to the tenants who need it. Then I started work cleaning on top of the compactor, then the garbage room upstairs, the little room where the tenants put their garbage."

Did you give that answer to that question?

A Yes, sir.

Q Now, at the time the accident happened, the chute and the hopper, they were full of garbage?

THE INTERPRETER: I don't know what the word "hopper

is in Spanish.

MR. IVONE: The box.

A He took the garbage out from the hopper, that box, and the chute was full of garbage.

MR. IVONE: Is the answer that it was full of garbage?

THE INTERPRETER: Yes.

Q That is all I am trying to find out.

A The chute was full of garbage.

THE INTERPRETER: In Spanish, tunnel.

THE COURT: You see, for purposes of recording all that happens we have to do that in English.

MR. IVONE: Just so that I can get it absolutely clear, your Honor.

Q Page 56, line 20.

"Q When this accident happened, was the chute full of garbage?

"A Yes, very full."

Did you give that answer to that question?

A Yes.

Q "Q And was the hopper bin of the compactor full of garbage?

"A Yes, it was full of garbage."

Did you give that answer to that question?

A He says no.

MR. IVONE: Will it be conceded he gave that answer to that question?

MR. SHANDELL: I will concede that is the answer in the transcript. I would ask Mr. Ivone to read the next question and answer.

Q "Q And when you were hit on the head with the bottle, was the hopper bin and the chute full of garbage?"

A He says no.

MR. IVONE: I didn't finish.

THE COURT: Maybe we can do --

MR. IVONE: He asked me to read it.

THE COURT: I don't know why, but may I suggest that in order to bring this to a close you ought to concede, as I believe will be conceded and already has been conceded what the question was and what the answer was. Neither the witness nor the interpreter really understand what you are doing, which is not your fault.

THE INTERPRETER: Your H nor, it is my fault.

THE COURT: Just a moment.

Mr. Ivone, would you adopt my suggestion so we can move on.

MR. IVONE: Very well. Just the following. Question on page 56, line 23.

"And was the hopper bin of the compactor full of garbage?

"A Yes, it was full of garbage."

Was that answer given to that question?

MR. SHANDELL: I concede that answer was given to that question.

Q Did you ever tell the people at the hospital that you were knocked unconscious?

A No, sir.

Q At any time in the past over the months that you operated the machine and you picked up the bags of garbage, did you ever cut your hand on pieces of glass?

MR. SHANDELL: Excuse me, your Honor. May I have that question reread?

THE COURT: Yes.

(Question read)

MR. SHANDELL: Objection.

THE WITNESS: No (In English).

THE COURT: Just a moment. Do you mean in handling the plastic bag, do you mean in some step or procedure prior to handling the plastic bag?

MR. IVONE: I mean in handling the plastic bags where glass may be in the bags and he cut his hand.

THE COURT: You mean in handling the bags?

MR. IVONE: Yes.

THE COURT: Would you mind clarifying that? Do you remember the question you asked about this yesterday?

MR. IVONE: I asked a question about this yesterday? I did not.

THE COURT: Well, similar to it. In any event, go ahead. If you will just make it clear, hopefully we will move along.

Q In handling the plastic bags after the garbage came out of the machine, did you ever cut your hand or one of your hands on glass?

MR. SHANDELL: Objection.

THE WITNESS: No (In English).

THE COURT: I wish you would make the objection before we have the answer out.

MR. SHANDELL: I tried to get up sooner. I am sorry.

THE COURT: You are too late. I don't agree with you in any event.

Q Now, in all the instructions that Mr. Nelson gave you through the interpreter, did he ever tell you to be careful?

A No.

Q Are you telling us that Mr. Nelson only told you

to watch out that the machine doesn't get damaged?

A Exactly.

Q And in all the three months that you were there on approval, that's all he said?

A That's all.

Q And after those three months when you were working the machine every day, did you ever have any questions of him, Nelson?

A No.

Q Did he ever talk to you after that?

A He says in the hospital.

Q I am sorry. I don't mean after the accident. I mean after that three month period.

A No.

Q Did you ever talk to Mr. Rivera, let's say, some months before?

A No.

Q Who was this interpreter?

A Mr. Sulliverez.

Q And Mr. Sulliverez, of course, he's in Puerto Rico now, isn't he?

A Yes, sir.

Q Mr. Rivera, he's here in New York City?

A I don't know exactly.

Q How about Mr. Diaz?

A I don't know.

Q So the only person that you say spoke to you in Spanish about the machine is someone in Puerto Rico?

A Yes, sir.

MR. IVONE: I have no further questions.

THE COURT: This will be a good time, then, ladies and gentlemen, for the morning recess. Ten minutes.

(Recess)

THE COURT: You have no questions, I assume, Mr. Kohler.

MR. KOHLER: No.

THE COURT: Mr. Isaac.

Before we begin, let me take this interval to emphasize something so that I don't take unwitting advantage of one of you.

When you object while Mr. Merced is speaking in Spanish, you may regard that as timely, gentlemen. I don't. Certain things in Spanish to me are close to what the English is. Others may feel the same way. That's why I insist if you are going to object, you object not only before the interpreter speaks but before Mr. Merced speaks, because we have been hearing quite a bit of Spanish, I admit, but still I think in fairness to everybody the objection should come

out timely. That means before even the witness speaks and not just before the interpreter speaks.

Mr. Isaac, are you ready, sir?

MR.ISAAC: As ready as I will ever be, Judge.

CROSS EXAMINATION

BY MR. ISAAC:

Q Sir, I want to go back with you, if I can, to the month of March in the year 1971 and I respectfully direct your attention, Mr. Merced, to that time.

You applied for and you received a job to be employed by my client, the Southbridge Towers, is that correct?

A Yes, sir.

Q And before you were officially hired you had some conversation with somebody about the nature of the work, correct?

A No.

Q You will have to speak up so the jury can hear you.

A No.

Q Let me try to rephrase the question. Before you got the job, before you were hired, did you talk to somebody at Southbridge Towers about the work? Just yes or no, please.

A No.

Q Let me try it this way: can we agree, Mr. Merced, that in March of 1971, you did not walk into the building and just start to work as a porter? May we agree on that, sir?

A No, sir. I came right to the Southbridge Tower and applied for an application to be employed by them.

Q Now I think we are moving along, sir. And did somebody at Southbridge Towers talk to you about your application?

A No.

Q Did somebody at Southbridge Towers come to you and say, "Mr. Merced, congratulations, you are hired"?

A No. Mr. Sulliverez give him an application.

Q Did Mr. Sulliverez tell you you were hired, that you got a job?

A No, he said that they need him there.

Q And did Mr. Sulliverez tell you that they wanted you to work there?

A Yes, because they were in need of employees.

Q Did Mr. Sulliverez tell you that in the Southbridge Towers or did he call you at home or did he meet you in the street? How did that come about?

A I was looking for work.

Q Did somebody at Southbridge Towers tell you how much they were going to pay for your services?

A No.

Q Did you ask anybody at Southbridge Towers how much they were paying for the jobs that were available?

A Yes.

Q Who did you ask?

A To Mr. Sulliverez.

Q Did Mr. Sulliverez tell you how much the pay was going to be?

A They were paying $132.77 when they were employing people to work for Southbridge Towers.

Q My question, sir, is really very simple. Listen carefully.

Did Mr. Sulliverez tell you how much they were paying, yes or no?

A I didn't ask how much I was going to get paid.

Q Did Mr. Sulliverez tell you when you were to report for your first day's work?

A Yes.

Q Did you know Mr. Sulliverez before March of 1971?

A No.

Q When is the first time you met Mr. Sulliverez in your entire life?

A For the first time the time that he came to

apply for a job.

Q When you came to apply for the job, did you go into a room?

A Yes.

Q Was Mr. Sulliverez in the room?

A Mr. Sulliverez was in that room and Mr. Herman.

Q Do you remember your first day on the job, sir? Just yes or no.

A No.

Q Well, do you remember reporting to work for this new employer for the first time?

A He says he came back from Puerto Rico.

Q I am not talking about Puerto Rico. We will get to that a little later, sir. I am talking about the month of March in the year 1971.

Do you have a recollection of reporting to work at any time in the month of March in the year 1971 before you went back to Puerto Rico?

A Yes, they have the regulation right there. They were very busy in work time.

Q Mr. Merced, do you understand Mr. Alvarez, this nice looking gentleman standing to your right?

A He says yes.

Q Does he speak a good Spanish?

A Yes.

Q And do you understand Spanish, Mr. Merced?

A Yes, sir.

Q Now listen, please, to Mr. Alvarez, this young man and I ask you the following question through Mr. Alvarez.

Do you recall in your own mind going to work for this new job in March, 1971? Either yes or no.

A Couldn't remember.

Q Do you remember the month of April, 1971, which would be the second month you were on the job?

A Yes, I do remember.

Q In April of 1971, did you work at a specific building?

A No, sir. I was in three months testing.

Q I am talking to you, sir, about the month of April, 1971. Listen to the question, sir. In April of 1971, were you working in one building, either yes or no?

A No.

Q Did you have any instructions as to signing in and signing out on this job?

A He says to come in and out in the time of eight hours period.

Q Was that Mr. Sulliverez who told you that, sir?

A Yes.

Q In the month of March, 1971, and April, 1971, those two months, did you talk to anybody else besides Mr. Sullivere? at the job?

A No, sir

Q He is the only person at Southbridg Towers that you ever spoke to in connection with your work in March and April, 1971?

A Yes, sir.

Q Did Mr. Sullivere? give you any instructions -- withdrawn.

Did Mr. Sullivere? talk to you about what your duties would be for the month of March and April, 1971?

A Yes, sir.

Q And when is the first time you have any recollection of Mr. Sullivere? giving you instructions as to your job responsibility?

A I couldn't remember.

Q Was it April, was it May, was it June? Can you help us with that? If you can recall. Don't guess.

A Couldn't remember.

Q Who was the superintendent of Southbridge Towers, if you know, when you started to work there in March of 1971?

A Mr. Mike Herman.

Q Who was the gentleman underneath Mike Herman, the assistant superintendent, in March or April of 1971?

A Mr. Rivera.

Q And Mr. Rivera is a gentleman who was your boss in March and April and May and June of 1971, right?

A Mr. Sullivere7.

Q You have told us about Mr. Sullivere7. I am now talking to you, sir, about Mr. Rivera, the man that you just named as the assistant superintendent.

Did you meet Mr. Rivera in March of 1971, if you remember?

A I saw him but I don't have time to talk with him.

Q Did you talk to Mr. Rivera in March of 1971, or did he talk to you in March of 1971? That's my question.

A No, sir.

Q Did you speak to Mr. Rivera in April or May or June of 1971?

A Mr. Rivera spoke to him, gave him orders.

Q Mr. Rivera gave you, Felix Merced, orders, is that what you are saying?

A Yes.

Q And Mr. Rivera gave you orders, was it March, was it April, was it May, was it June or was it during that entire period?

A During that time, Mr. Rivera give instructions to Mr. Sulliverez so Mr. Sulliverez to give the instructions to Mr. Merced.

Q Did Mr. Rivera, in March or April or May or June of the year 1971, talk to you directly, not through Mr. Sulliverez but directly?

A Yes, he spoke with me.

Q And did Mr. Rivera speak Spanish and English?

A Yes, sir.

Q As a matter of fact, Mr. Merced, you have been in the United States since 1954, is that right?

A Yes, sir.

Q And during those years between 1954 and 1971, approximately 17 years or so, you learned to speak English to a certain extent, didn't you?

A No.

Q During those 17 years, sir, you leanred to understand English to a certain extent, didn't you, sir?

A He said the reason that he could not speak English is because during the time that he has been in this country he has been going with Spanish-speaking people and working with this type of people and he didn't have what you call the station to speak English.

Q My question is whether or not in these 17 years

you learned to speak English to a certain extent.

A He says whatever he know or whatever he learned, it is not enough to have a conversation to talk to people even in a case like this.

Q When Mr. Rivera spoke to you, sir, in March or April or May, 1971, when he spoke to you directly, as you have just testified, did he speak to you in Spanish?

A He spoke to me in Spanish.

Q Did he tell you, Mr. Merced, in Spanish what your job duties would be? Just yes or no, please, if you can.

A Yes.

Q Did he in March of 1971 talk to you about a machine called a compactor?

A No.

Q In the month of April, 1971, did he talk to you about a machine called a compactor?

A No.

Q In May or June of 1971, did Mr. Rivera talk to you in Spanish about a machine called a compactor?

A No.

Q Did you see a compactor machine in March?

A Yes.

Q Or April or May or June in 1971?

A He answered yes to all those months of 1971.

Q Did you see a compactor in the month of March, 1971, specifically?

A Yes.

Q You remember that, correct?

A Correct.

Q Wasn't Mr. Rivera there with you in March of 1971?

A He says that Mr. Rivera was in his office, he was in his work.

Q Was Mr. Rivera with you in March of 1971, sir, when you looked at the compactor?

A No.

Q Was Mr. Sulliverez with you in March of 1971 when you saw the compactor?

A I was not working with the compactor machine.

Q I am not asking you that, Mr. Merced. You told this jury a few moments ago that you saw this machine, this compactor machine, starting in March of 1971.

A Exactly.

Q When you saw this machine in March of 1971, was Mr. Rivera with you?

A He says he keeps telling you Mr. Rivera was at his office and he was at his work.

Q Was Mr. Sulliverez with you when you saw the compactor machine for the first time?

A Mr. Sulliverez was at his work and he was doing his work.

Q Sir, could you help us out? Was Mr. Sulliverez with you in March of 1971 when you saw the machine for the first time?

A No.

Q Was anybody from Southbridge Towers with you, sir, in March of 1971 when you saw the compactor for the first time?

A The one who work at it.

Q What was his name, sir?

A I couldn't recall his name.

Q Where was this man working, Mr. Merced?

A This man was working at the compactor machine.

Q In what building?

A In building number two.

Q And did you see compactors in the other buildings, too?

A No. When I came to the Southbridge Towers all the buildings were closed. All the machines were not installed and a few buildings were open where these machines were working.

Q How many compactors do you say you recall being in operation in March of the year 1971?

A The only two buildings that he could recall to see this compactor machine to be working on was building number one and building number two.

Q And did you see the compactor in building number one and building number two in March, 1971?

A Yes, sir, exactly.

Q And did you see -- withdrawn.

Do you know the names of the people that were working in the compactor room in building number one or building number two?

A No, sir.

Q Did you see what they were doing, Mr. Merced?

A Yes, I was seeing what they were doing, but I have a different type of work. I was working with the floors, stripping of the floors.

Q I am not talking to you about stripping the floors. I am talking about the compactor. Did you see these gentlemen working at the compactor, yes or no?

A Yes, the time that I have to look at these people working because I don't have all day to be with them.

Q Did these people talk to you, Mr. Merced?

A No.

Q Did these people speak Spanish?

A Yes.

Q And in March of 1971 and April of 1971, did you see how the machine was turned on? Just yes or no, please.

A No.

Q In March or April of 1971, did you see how the machine was turned off?

A No.

Q Sir, sometime in the month of June or perhaps early July of 1971, you asked for a leave of absence, did you not, from the job?

A Yes.

Q And the building said it was okay for you to leave for five or six months, correct?

A Because of a problem that was in Puerto Rico --

Q I am not asking you about the problem.

A He said for that period of time that he left from work he went to Puerto Rico.

Q Mr. Merced, did the building say it was all right for you to go to Puerto Rico for this six months or so? Just yes or no, please.

A Yes, they gave me the leave for five months.

Q Up to that time, sir -- now listen carefully --

March, April, May --

THE WITNESS: No (In English).

Q March, April or May, June or July, did you ever see anybody turn on the compactor machine? Either yes or no, please.

A Yes.

Q Tell the members of the jury when it was during that period of time before you left for Puerto Rico that you saw the machine being turned on.

A During the period of three months that he was stationed on that job, he take the time to come and see the people working on the compactor machine, he take the time to see how these people operate the machine.

Q Before you left for Puerto Rico, sir, did you ever operate the compactor machine?

A No.

Q Did you ever turn a switch to put it on or switch to turn it off?

A No, sir.

Q As I understand you, and please correct me if I am wrong, for a three month period, some three month period, before you went to Puerto Rico, you watched the machine as it functioned? Yes?

A Yes.

Q And some three months period of time before you went back to Puerto Rico you saw how the machine was turned on in the morning? Yes?

A No.

Q When is the very first time in your life, Mr. Merced, that you ever saw this compactor machine turned on by pushing a button of some kind?

Can't you just give us a date, Mr. Merced?

MR. SHANDELL: May the witness answer the question without being badgered by this attorney?

MR. ISAAC: I object to the word "badger."

THE COURT: There hasn't been any badgering yet.

Mr. Interpreter, what does he say?

THE INTERPRETER: Your Honor, he says that during the time he have mostly in lunch time this time when he was speaking to me just now, he said he came to see the compactor machine, the way they operate.

THE COURT: Perhaps he doesn't understand the question.

Let's put it again.

MR. ISAAC: With your Honor's kind permission, may I have it read back so I don't say it a different way?

THE COURT: Yes.

(Question Read)

A He keep bringing it out during the time he was at his work during the period of three months, he have time during lunch to see that machine but he never touch it.

MR. ISAAC: I respectfully move the answer be stricken as not responsive.

THE COURT: Yes, granted. You will have to try again.

Mr. Merced -

MR. ISAAC: I withdraw it.

THE COURT: You withdraw it?

MR. ISAAC: I withdraw that particular question.

THE COURT: Put it again.

Q Sir, are you able to give the honorable judge and members of the jury a specific date or time when you first saw the machine being turned on in the morning? Can you do that, sir, either yes or no?

A No.

Q Between the months of March, April, May, June and July, do you have a recollection of seeing somebody during that time turning the machine on and off? Do you have a recollection, either yes or no?

A No.

Q Between March, 1971, and July, '71, did you ever see garbage coming from the chute?

A I saw or I heard the garbage came down, but the machine have a door, so he didn't see it.

Q The door was closed, right?

A The door was closed.

Q And the machine makes noise, right?

A Machine make noise.

Q And during that period of time between March and July, 1971, you heard the garbage coming into the hopper in the compactor room?

A He says the garbage came down and hit what they call like a ramp on the side of the machine.

Q You couldn't see that with the door closed, could you, sir?

A No, sir.

Q Did you see anybody --

THE INTERPRETER: He said something in Spanish.

MR. ISAAC: I am sorry.

THE INTERPRETER: You asked a question. He says that if he stay there and the door was open, something could break his face.

Q Before you left for Puerto Rico, Mr. Merced, did you ever see --

MR. ISAAC: If I can find the exhibit.

(Counsel confer)

MR. ISAAC: I withdraw the question.

Q Mr. Merced, before you left for Puerto Rico, did you ever see anybody using a stick similar to this? I am holding Exhibit 3.

A Yes.

Q How many times did you see somebody using a stick like this before you left for Puerto Rico? How many times?

A He say when he have the opportunity to come and see the people working the machine, because he was stripping the floors, he has other work to do, once a day he saw how people use the stick.

Q Mr. Merced, I am going to ask you again, do you understand Mr. Alvarez when he speaks to you? Do you understand the interpreter here?

MR. SHANDELL: I object, your Honor.

A Yes.

Q My question, sir, is: can you tell us -- if you can't help us, tell us, "I can't" -- can you tell the folks on this jury approximately how many times you saw the use of a stick similar to this, Exhibit 3, before you left for Puerto Rico?

MR. SHANDELL: Objection, your Honor.

THE COURT: Overruled.

A He says once in the day he saw.

Q Once each day for three months?

A One time a day during the period of three months.

Q You worked five days a week, sir?

A Yes, I worked five days a week.

Q That would be approximately five times a week or twenty times a month, multiplied by three would be approximately sixty times.

MR. ISAAC: I withdraw that, Judge. It is too long.

Q If we take one time a day, sir, five days a week, approximately 20 times a month --

MR. SHANDELL: Objection.

MR. ISAAC: I haven't finished the question yet.

MR. SHANDELL: Your Honor wants me to object before anything is said in Spanish or English so I got up to object. Everyone here can multiply. It has nothing to do with the case whether the witness can.

THE COURT: In any event, it already has in effect been answered.

MR. ISAAC: Question is withdrawn.

Q During those approximately 60 times that you saw the stick being used, did you ever talk tc the user of the stick to ask him what he was doing?

MR. IVONE: I will object. I guess I am too late, your Honor. It seems I must move to strike the answer as unresponsive. It calls for a yes or no answer.

THE COURT: It is a very difficult process at best. I wonder whether we are proving much by these objections.

What does the witness say, Mr. Interpreter?

THE INTERPRETER: The witness says that he have the time to see the use of the stick once and he talk about it.

THE COURT: He talked about it. All right, next question.

Q Were you given instructions at that time as to what the stick was being used for?

A Yes.

Q And the people that actually did the work on the machine explained this to you, correct?

A Yes, correct.

Q Those are the people whose names you don't recall, is that it?

A No, I don't recall. I don't remember.

Q Did they also explain to you that there was a switch that you could turn the machine on with?

THE INTERPRETER: He said they don't ask him. Let me ask him again.

MR. ISAAC: Let me ask the question over again.

Q While they explained to you, sir, about the use of the stick, did they also explain to you or tell you about the button and switches to turn the machine on and off?

A They talk just about the stick, not about the switches.

Q Did you see anyone during that period of time turning on or turning off the switches?

A No.

Q You came back from Puerto Rico, sir, in December of 1971, is that true?

A December 3, 1971.

Q You recall the exact date of your return from Puerto Rico, is that it?

A Exactly.

Q All right.

If you returned from Puerto Rico on December 3, 1971, when did you report back to work at Southbridge Towers?

A December 7, 1971.

Q Was that a Monday?

A Monday.

Q And do you recall going to work that Monday, December 7, 1971?

A I remember, sir.

Q And before you returned to work on December 7, 1971, before that, did you have to inform someone at Southbridge Towers that you were back?

A Exactly.

Q And who did you inform?

A To Mr. Sanchez.

Q What is his first name.

A Ismael.

Q Ismael?

A Yes.

Q Was he employed by Southbridge Towers?

A Yes, he was working there.

Q Was he working there before you left for Puerto Rico?

A Yes, sir.

Q Is he in Puerto Rico now?

A Yes, sir.

Q Was he a friend of yours?

A He was the pastor of the church.

Q What was his title? What was his job at Southbridge Towers?

A He was employed three months testing.

Q He wasn't a boss or supervisor, was he?

A He was a worker with him with a buffing machine.

That is the machine they polish the floor.

Q With whom at Southbridge Towers, what boss or supervisor, did you work out your return on December 7th?

A He says he was working there with Mr. Sanchez.

Q Was Mr. Sulliverez there on December 7, 1971?

A Yes.

Q Was Mr. Rivera there in 1971, December?

A No, sir.

Q Was there a new assistant superintendent, a new boss?

A Was right there Mr. Herman, Mr. Diaz and the other boss, the big boss, Nelson.

Q Did you understand Mr. Alvarez when he was talking in English a few seconds ago?

A No, sir.

Q Did you hear Mr. Alvarez translating in English to me a few minutes ago?

A He says no.

Q Mr. Merced, what is Mr. Diaz' first name?

A Manuel.

Q Was he the new assistant superintendent when you started work in December of 1971, sir?

A The name of the new assistant superintendent was Luis Rivera in 1971.

Q I am talking about when you returned from Puerto Rico. You told us you returned on December 3rd. You told us you reported to work December 7, 1971.

A Was Mr. Manuel Diaz.

Q And Mr. Manuel Diaz was your boss, was he not?

A Mr. Herman was his boss.

Q Was Mr. Diaz your boss, over you?

A He was the supervisor of his job.

Q And did Mr. Diaz talk to you when you returned to work on December 7, 1971?

A Yes.

Q And did he talk to you about what your job was going to be?

A He says his work was to strip off the floors.

Q Did you have any other work given to you by Mr. Diaz in December of 1971?

A I was for three months of test sweeping the floors over the buildings.

Q You told us about that three months between March and July, 1971, didn't you?

MR. SHANDELL: Now he is talking about December of 1971, if your Honor please.

THE COURT: Let's go back, gentlemen.

MR. ISAAC: Maybe I can clear it up.

THE COURT: I wish you would.

Q Are you saying there was another three month period of probation starting on December 7, 1971?

A Yes, sir.

Q Did you work on a compactor in December, 1971?

A No.

Q Didn't Mr. Diaz take you and speak to you in Spanish in December of 1971 when you came back from Puerto Rico and show you a machine called a compactor? Yes or no?

A No.

Q Did he give you any instructions at that time, December of 1971, about the use of this machine?

A No.

Q Did Mr. Diaz ever -- did Mr. Diaz ever give you any instructions or talk to you about your duties in connection with the compactor?

A No.

Q How about Mr. Rivera, did he ever give you any talk, conversation, about the use of the compactor at any time?

A No.

Q How about Mr. Sullivere?

A No.

Q How about Mr. Herman?

A No.

Q How about Mr. Nelson?

A No.

Q Sir, is there anybody, any name that you can give the members of this jury employed by Southbridge Towers who ever gave you a talk or instructions or a conversation about the compactor machine and how it functions? Can you, yes or no?

A No.

Q Can you tell us the name of anybody at Southbridge Towers who first directed you to perform any work in the compactor room? Can you, yes or no?

A No.

Q When is the very first time in your life, Mr. Merced, that you put this machine on to start it in its operation?

A In the month of May.

Q Mr. Merced, are you guessing or do you have a definite recollection that it was the month of May?

A I am very sure it was in the month of May.

Q Did you ever make a statement, sir, that you were sure it was the month of April?

A He says he didn't make no statement in the month of April.

MR. ISAAC: Page 29 of the examination before trial, gentlemen andyour Honor. Make it the bottom of page 28, line 19, for continuity.

"Q When you say that you worked for three months in the building, when was that?

"A I don't remember the months but I remember it was three months.

"Q Was that in 1971?

"A No, 1972.

"Q And how long before the accident was that?

"A I started to work in December, the 7th of December of 1971, until April the 7, 1972, and I told you befor that I was just on a tryout period on an approval.

"Q All right. Now, is it your testimony, Mr. Merced, that you first worked on the compactor in April of 1972?

"A . Yes. I started to work with it then because the man who worked the compactor before left the job. That was building number seven Beekman Street."

MR. ISAAC: Mr. Shandell, rather than ask for all this to be repeated, will you concede those were the questions and those were the recorded answers?

MR. SHANDELL: I so concede.

Q Again reading from page 28.

"Q When you say that they put you to work, who put you to work on the compactor?

"A The foreman.

"Q Mr. Sulliverez?

"A Yes.

"Q When did Mr. Sulliverez first put you to work on the compactor?

"A I worked for three months in the building before I worked on it."

MR. ISAAC: May we have a concession, to save time, those were the questions and those were the recorded answers?

MR. SHANDELL: Those were the recorded answers and those were the questions.

Q Mr. Merced, I want you to think a few moments to yourself. Do you still say that there was nobody that you can recall that started you working on the compactor for the first time?

MR. SHANDELL: Judge, the answer before was that nobody told him how to work the compactor before, not that nobody told him to work on the compactor before.

THE COURT: This is an objection as to form and I sustain it.

MR. SHANDELL: Thank you.

Q Did anybody at Southbridge Towers tell you that you were going to be working in a compactor room with a compactor?

A Nobody.

Q When you first started to work on the compactor, sir, whether it was April or May or whenever it was, Mr. Merced, did somebody from the building tell you in what building you were to work in this compactor room?

MR. ISAAC: I withdraw the question.

Q Let me ask it this way. When you first started to work in the compactor room, sir, what building was it?

A Building number seven.

Q And who, if anybody, assigned you to building number seven?

A Mr. Sulliverez.

THE COURT: Did Sulliverez tell you to work each morning on the compacting machine?

THE WITNESS: Yes, your Honor.

THE COURT: Would you suffer an interruption here for luncheon, Mr. Isaac?

MR. ISAAC: I will suffer anything your Honor wishes to do at this point.

THE COURT: Do you have much more to go?

MR. ISAAC: I do. It will be very lengthy at the rate we are going now.

THE COURT: We will break for lunch, Miss Stone and ladies and gentlemen, at a quarter of one and we will resume sharply at two o'clock.

(Jury leaves courtroom)

THE COURT: Mr. Shandell, how many more witnesses have you got?

MR. SHANDELL: None, your Honor. I may offer an exhibit again, but after that I shall rest.

THE COURT: How much longer are you going to be, Mr. Isaac?

MR. ISAAC: That is a very tough question, Judge.

THE COURT: I know.

MR. ISAAC: You mean on the basis of the way we are going here? I will be here all afternoon, sir.

THE COURT: Please, you can't go on like this forever.

MR. ISAAC: I think your Honor would agree that I am trying to expedite the matter and I am not purposely or intentionally trying to prolong the situation, but I have to do what I think is right as a lawyer. Sometimes in this situation it takes a little longer.

THE COURT: I don't want to start an argument.

MR. ISAAC: I understand that.

THE COURT: You have been going over the same ground for a long time. See if you can't get it lined up a little better over lunch.

MR. ISAAC: All right.

(Luncheon Recess)

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AFTERNOON SESSION

2:00 p.m.

(Jury present)

F E L X M E R C E D, resumed.

THE COURT: All right, Mr. Isaac.

CROSS EXAMINATION CONTINUED

BY MR. ISAAC (Through Interpreter)

Q Mr. Merced, do you know Mr. Melendez?

A Yes.

Q He was in court the other day testifying, you were here, correct?

A Yes.

Q Mr. Melendez said that he never was instructed to put his hands in the machine, that's why the building gave him a stick, did you hear that?

A I don't know about it.

Q Did anybody explain that to you in Spanish, that is, explain his statement?

A No.

Q Is Mr. Melendez correct?

MR. SHANDELL: Objection, your Honor.

THE COURT: Yes. That I don't think is the appropriate form for what you are seeking.

Q Would you agree, Mr. Merced, with what Mr.

Melendez said yesterday, specifically, that there were no instructions to put your hand in a machine that was on?

MR. SHANDELL: Objection. How would this witness know what Mr. Melendez' instructions were?

THE COURT: Yes, I agree.

Q Let me ask you this. Yesterday afternoon, sir, you testified that Mr. Sullivere? never instructed you to put your hand in a machine which was on, that's what you said yesterday, wasn't it, in answer to one of Mr. Ivone's questions? Yes or no.

A Yes.

Q You also said yesterday afternoon that Mr. Nelson never told you to stick your hand into a machine that was operating, do you remember that?

A No, sir.

Q You didn't say that yesterday afternoon?

A No.

Q You also said yesterday afternoon that Mr. Herman never told you to put your hand in a machine which was on and working, do you remember that?

A No.

Q Mr. Merced, I want you to think a little bit about yesterday afternoon.

Do you remember this gentleman -- I am talking

about the lawyer, Mr. Ivone, now -- asking you on that very same witness stand, testifying that Mr. Sulliverez, Mr. Nelson, Mr. Herman, none of them, ever told you or instructed you to put your hand in the machine when that machine was operating?

MR. SHANDELL: Objection to the form of the question.

THE COURT: Read it back.

(Question read)

MR. ISAAC: I think that is a fair question, your Honor.

THE COURT: I think the point of it is, yes, but while we have this interruption could you make it simpler? It would be easier for everybody if you did.

MR. ISAAC: I am trying to save time by lumping three together instead of separately.

THE COURT: Dealing with the circumstances we are dealing with, I don't think it is helpful. Go ahead.

Q Mr. Merced, yesterday while you were sitting in the very same chair, did you testify that Mr. Nelson never instructed you to put your hand in a machine that was working?

MR. IVONE: I will object.

MR. ISAAC: It calls for a yes or no answer, if

your Honor please.

A Yes.

Q And did you also say yesterday while you were sitting in the same chair that Mr. Herman never told you to put your hand in a machine that was working? Did you testify to that yesterday, yes or no?

A Yes.

Q And did you also testify under oath yesterday that Mr. Sulliverez never told you to put your hand in a machine, this compactor machine, that was working?

MR. ISAAC: Can I have a yes or no answer, your Honor?

A Yes.

Q How tall are you, Mr. Merced?

A Seventy inches.

Q That would be five foot ten inches?

A Five-ten.

Q Would you please rise?

MR. ISAAC: With the Court's permission, of course.

Q Are you six feet tall? Aren't you six feet tall, at least?

A Five-ten inches.

Q How high was the compactor off the floor?

A Three to four foot high.

Q And with this hopper door open, where would the door come up to your body? Could you show us?

(Indicating)

MR. ISAAC: Indicating the midriff, your Honor.

Q And your head was then above the opening of the door, correct?

A Yes.

Q When you said this accident happened on July 13, 1972, did you put your head in the hopper?

A I don't put my hand inside.

Q Head or hand?

A Hand.

Q Are you saying, sir, you didn't put your hand into the hopper?

A No, I didn't put my hand inside the hopper.

Q At the time of the accident when you hurt yourself, Mr. Merced, did you have your hand in that opening?

MR. SHANDELL: What opening, if your Honor please?

THE COURT: Hold it. There is an objection.

MR. ISAAC: I know, but it doesn't do much good, because while your Honor is talking --

MR. SHANDELL: The man can't understand what I am saying or the significance of the procedures and I can't

help that. I have to wait until the question is over to object.

THE COURT: Let us not argue about it.

MR. ISAAC: I will withdraw the question, your Honor. Withdrawn.

THE COURT: I wish you would, please.

MR. ISAAC: It is obvious I am talking about the opening, the hopper.

MR. SHANDELL: Use language he understands. I don't know if he knows what a hopper is.

THE COURT: It is difficult enough. Let's not wrangle about these things. I do think it fair you make it clear you are referring to the hopper.

MR. ISAAC: Absolutely.

Q Mr. Merced, when I was asking you questions about the hopper and the opening, I am referring to the door on the compactor. Do you understand what I mean when I say "hopper"?

A Okay.

Q This is the opening or door that I am talking about. Okay?

At the time that you had the accident, was your hand inside there?

A My hand was inside of the machine.

Q You told us that before, too, correct?

A Correct.

Q Was your head or part of your head in that opening at the time the accident happened? Can you answer yes or no, please?

A Yes.

Q And in order to put your head in there you had to bend down a little, didn't you?

A Yes, I have to decline myself.

Q And was your head in the hopper, the opening, when you claim this bottle hit it?

A Yes.

Q I take it, Mr. Merced, that nobody at Southbridge Towers ever told you to put your head in that opening with the machine working, did they? Yes or no, please.

MR. ISAAC: Let me withdraw it.

Q Did Mr. Nelson ever instruct you to put your head in the opening of that machine with the machine working? Yes or no.

A No.

Q And Mr. Sullivere? never told you, did he?

A No.

Q And Mr. Herman never told you, did he?

A No.

Q And Mr. Diaz never told you, did he?

A No.

Q And Mr. Rivera never told you, did he?

A No.

Q And Mr. Melendez never told you, did he?

A (In English) Mr. Melendez is not the foreman, he is not my boss.

MR. ISAAC: Let the record indicate that answer was given in English, your Honor.

THE COURT: The record will indicate whatever it indicates. We all heard what we heard. Let's move along.

Q Can you tell the members of the jury the approximate size of the door? Approximately.

A He don't know exactly the width and the inches of the machine, of the door of the machine.

Q On July 13, 1972, you started work at eight o'clock that morning?

A Yes.

Q And that's what you had been doing for several months before that, is that right?

A Yes.

Q And the first thing you did about eight o'clock in the morning that day was turn on the compactor, correct?

A Yes.

Q And you knew how to do that, didn't you, Mr. Merced?

A Yes, sir.

Q You had been doing that every day that you worked at least since April or May, 1972, right?

A No.

Q Did you use the compactor or turn it on every day since May of 1972?

A From April to July of 1972.

Q From April to July,1972, every day that you worked, you came in in the morning and you turned on the compactor, right?

A I came to the machine room and started the machine.

Q And you started the machine in the morning by pulling the switch on the wall?

A Yes.

Q And the "on" button which is attached to the machine, right?

A No.

Q You started the machine then by pulling the switch on the wall,. is that it?

A He says that he would like to explain.

Q Could you help us out, Mr. Merced? When you started the machine -- withdrawn.

When you started work in the morning, you had to put the machine on, didn't you, sir?

A Yes, sir, I put the machine to work.

Q And in order to put the machine on you pulled a switch which was on the wall, right?

A Yes, sir.

Q And then the machine you say would begin to operate, is that correct?

A Yes, sir, it would start working.

Q And the garbage would then begin to compact -- withdrawn. Let me change that word.

The garbage would then begin to be pushed from the machine into the bags, is that right?

A I have to use the stick to bring it down the garbage so it could be taken to be packed up into the bags.

Q Mr. Merced, wouldn't you use the stick only if you had a blockage?

A I used the stick every time that the machine have a lot of garbage.

Q If the garbage were coming down with no blockage, you wouldn't have to use the stick, would you?

A He keeps doing his work by using the procedure of the stick to push down the garbage through the compactor or the cylinder. He sees the garbage filling the bags and

he ties the bag and that is his work.

Q Before you got to tying the bags, Mr. Merced, if the garbage was coming free down the chute into the hopper and the machine was working where it was pushing the garbage out, you wouldn't have to use the stick, would you, Mr. Merced?

MR. SHANDELL: Objection.

THE COURT: Overruled.

MR. SHANDELL: He is asking a hypothetical question, Judge. It is not based on any facts in evidence.

THE COURT: I am sorry. Whatever, I will allow it.

A He always stay with the stick trying to keep working with the garbage that stay around.

Q And you kept using the stick even when there was nothing blocking the garbage?

MR. SHANDELL: Objection. There is no testimony there was a time nothing blocking the garbage.

THE COURT: Mr. Shandell, I don't think necessarily you are incorrect but the question seems to be inappropriate in any event given his recent answer.

Let's go back.

MR. ISAAC: Read the question back.

(Question read)

A He says he keep using the stick.

Q Was it your job to remove the garbage bag from the chute? I will point it out in the photograph.

MR. ISAAC: With the Court's permission, may I stand here for a moment?

THE COURT: Yes.

Q Was it your job to remove the garbage bag which was attached to the snout I am pointing to in Exhibit 7?

A Mr. Merced's work was to take out the garbage that was inside the bag when the bag was full.

Q Did you take out any bags of garbage on July 13, 1972, before you had the accident?

A Yes, sir. I took out five bags.

Q And you did that as part of your regular job five days a week, is that right, sir?

A Yes, sir.

Q And working this compactor April, May, June, July, 1972, you knew how that machine operated and functioned, didn't you?

MR. IVONE: Objection, your Honor. It is either yes or no.

A No.

Q Before you started working for Southbridge Towers, you worked for a company called G & B, did you not?

A Yes. In this place where he worked, G & B, was pants and trousers, something like that.

Q Did you work as a machine operator, working on a machine?

A Yes, sir. I was doing the type of work taking in the cuff on the pants.

Q Did you ever stick your hand in that machine when it was operating?

A No, sir.

Q And before that you worked in construction, did you not, for some time?

A Yes, sir.

Q You worked with cementing machines, didn't you?

A No, sir.

Q Did you ever work with machines on a construction site?

A No, sir. He says he was a helper.

Q You actually watched this compactor for at least three months before you started working on it, is that right?

A Yes, sir.

Q Did you ever have classes --

A No, sir.

Q Let me finish my question, please.

Did you ever have classes or lessons where on the time machine where you signed in you were given instructions to appear at some time during the day for lessons or classes?

A No.

Q Did you ever attend a class on safety with Mr. Diaz or Mr. Rivera?

A I don't receive any class.

Q Did you ever receive any notice, sir, in Spanish to appear for a meeting of all porters and handymen once a week or once every two weeks? To discuss, amongst a lot of things, the compactor?

A No.

Q Did you ever see anybody from Southbridge, including yourself, go up to the first or second floor because there was a blockage in the machine and put weights down to clear the blockage? Did you ever see that? Yes or no.

A No.

Q Did you ever go up to the first or second floor to try to remove, with a co-employee, a blockage in the machine? Yes or no, please.

A No.

Q Did you ever go up to the first or second floor to push or try to push garbage down through the chute? Yes

or no, please.

A Yes, I went to the second floor.

Q When you went to the second floor, what did you use, sir, to try to clear the blockage?

MR. IVONE: Objection, your Honor. He has not said it was a blockage that he went to the second floor for.

THE COURT: Go ahead.

A No.

Q What did you use when you went up to the first or second floor?

A He looked the way the block was in the chute there and came back down to the machine. He came down back to the machine.

Q Besides looking to see what was blocked, did you or anybody else with you do anything to clear that block?

A Take the stick, and start pushing up to break out that blockage.

Q From the first or second floor?

A No.

Q I am talking about when you went up to the first or second floor and you told us you looked down to see the blockage. What, if anything, did you do as part of your practice to clear that blockage?

A He says nothing.

Q You just left the blockage like that?

A My work have to be to break from the inside up and break the blockage.

Q Did you ever find yourself in a situation, Mr. Merced, where you took the stick and you couldn't unblock it?

A Yes, sir.

Q And when that happened, sir, what did you do?

A He explained this way, Mr. Merced. He used a bigger stick, a larger stick, because this is not the same stick, this is a little shorter, and he doing it a way I have show you before, up, you know, to break the blockage.

Q Are you now telling us, Mr. Merced, that there were other sticks available besides a stick similar to this, Exhibit 3? Are you saying there were other sticks, bigger sticks?

A He said that he searched around to try to find a larger stick because this is a small stick and he have to put all his body into the machine so he have to break the blockage. The stick is so small that he have to take that risk to put his body inside the machine.

Q Weren't you instructed, Mr. Merced, to call, to notify your boss or the assistant superintendent when you had a blockage that couldn't be moved with the stick?

A No.

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Q Were you aware, Mr. Merced, that Southbridge Towers, your employer, had a service agreement or service contract with somebody who was on call to take care of these things? Do you know that?

MR. SHANDELL: Objection, your Honor.

Q If you know.

THE COURT: I will sustain the objection to this extent. I think you had better start over. How anybody got the question with both talking at once, I don't know. I do think you are entitled to know whether he received any instruction or information to that effect.

Q Sir, weren't you informed before July of 1972 that the Southbridge Towers had people under an agreement to be called in case of an emergency? Were you given that information? Yes or no.

A No.

Q Did anybody inform you that there was somebody on call 24 hours in case there was any need to clear a blockage? Did anyone give you that information?

A He says he don't receive no type of help of this kind.

Q Nobody at Southbridge Towers ever told you about outside help, nobody at Southbridge Towers ever told you how to turn the machine on --

MR. SHANDELL: Wait a minute.

MR. ISAAC: I am doing it in series.

Q -- nobody at Southbridge Towers ever --

MR. SHANDELL: Did we get an answer to the last question?

MR. ISAAC: I am asking an omnibus question and trying to break it down, Mr. Shandell.

MR. SHANDELL: Objection to that question.

THE COURT: I believe we have already received answers to the last one about switch and I see no point in covering it again.

MR. ISAAC: I withdraw the question.

Q Nobody at Southbridge Towers, Mr. Merced, ever told you or gave you instructions about this compactor at all, they just told you to go and start working it, is that it?

A No, sir.

Q Is that true or not?

MR. KOHLER: May we have the answer that the witness gave, your Honor?

THE COURT: Yes.

A No.

THE COURT: Anything else?

MR. ISAAC: Unfortunately I do, your Honor. Will

you bear with me a little longer?

THE COURT: I wish you would try to bring it to an end.

MR. ISAAC: I am doing the very best I can, I assure the Court.

Q Did you ever have a direct conversation with Mr. Nelson about anything, yes or no?

A Never.

Q Did you ever have a direct conversation with Mr. Herman about anything, yes or no?

A No.

Q Did you ever have a direct conversation with Mr. Diaz about anything, yes or no?

A No.

Q Did you ever have a direct conversation with Mr. Rivera, yes or no?

A No.

Q How about Mr. Sullivera?

A No.

Q Would you put the photograph down, sir?

THE INTERPRETER: Should I put it over there?

MR. ISAAC: I am asking the witness to put the photograph down. I will ask one or two more questions and I think I will be finished.

Q When you started to work in the morning, Mr. Merced, you were required to stay in that compactor room until all of the garbage was pushed out and into bags, right?

A Exactly.

Q No matter how long it took, is that right?

A Two hours the time he has.

Q Do you mean that if two hours passed and there was still garbage working you would shut off the machine?

A We have to stay there continuously until the work is done.

Q No matter how long it took, whether it took two hours or two and a half hours or four hours, right?

A Yes, sir.

Q And you weren't supposed to ever leave the compactor room with the machine going, is that right? Yes or no.

A He says during the time he have the work to be working that machine, the machine had to be on.

Q And you had to stay with the machine while it was on, correct?

A Yes, he have to stay there taking out the garbage.

Q Did anybody tell you or instruct you that you are to stay with the machine until all the garbage has been completed?

A Yes, sir.

Q Who gave you that information or instruction?

A This information was given to me by the company.

Q What company -- Southbridge Towers?

A Southbridge Towers.

Q Tell the folks here what the name of the man was that gave you that instruction or information.

A Mr. Harry Nelson gave instructions to everyone --

MR.ISAAC: Your Honor, may I stop the answer at this point because we are going far afield.

MR. SHANDELL: I don't think we are going far afield at all.

THE COURT: The question, Mr. Interpreter, is as follows: who on behalf of the company told you that?

THE WITNESS: Harry Nelson.

Q Did Harry Nelson talk to you directly?

A No.

Q What is the name of the individual that actually talked to you?

MR. SHANDELL: Judge, I object to the question.

THE COURT: Overruled.

Who told you this or who was present when you were there with Nelson?

THE WITNESS: Mr. Sullivere?.

THE COURT: Are you trying to tell us that Nelson spoke and Sulliverez acted as interpreter for Mr. Nelson and for you?

THE WITNESS: Yes, your Honor.

THE COURT: Anything else?

Q Just tell us the time, the approximate time, if you can, the approximate date when that conversation took place.

A No, sir.

Q Will you tell us when Mr. Nelson, through Mr. Sulliverez, gave you that information or instruction?

A Couldn't remember.

Q Was it after you came back from Puerto Rico or before?

A When he came from Puerto Rico.

Q And was it about the same time you were starting your work on the compactor?

A Two days before.

Q You remember that, two days before?

A Yes.

MR. ISAAC: That is all.

MR. REGAN: I have no questions.

THE COURT: Any redirect, Mr. Shandell?

MR. SHANDELL: Yes, If your Honor please.

REDIRECT EXAMINATION

BY MR. SHANDELL:

Q Mr. Merced, Mr. Ivone read to you the following question from your examination before trial, page 56, line 23.

"Q And was the hopper bin of the compactor full of garbage?

"A Yes, it was full of garbage."

Did you also say this at your examination before trial, the very next question and answer, page 57, line 2.

MR. IVONE: Your Honor, before he reads the question and the answer, will the Court look it over? There is a nonresponsive answer to a portion of it. That portion should be stricken.

THE COURT: I don't seem to have a copy of this.

MR. IVONE: Page 57. I have a copy here, your Honor. It is the first question on top and the first answer. Two paragraphs long is the answer.

THE COURT: Well, I assume your objection is to a portion, which is the last paragraph, lines 9 to 12.

MR. IVONE: Yes.

THE COURT: I agree. That is totally nonresponsive and will not be permitted in evidence.

You see, Mr. Shandell?

MR. SHANDELL: I see what your Honor's ruling is.

Q "Q" --

THE INTERPRETER: Are you reading those or do you want me to keep translating to him as interpreter?

MR. SHANDELL: Please.

Q "And when you were hit on the head with the bottle, was the hopper bin and the chute full of garbage?

"A Yes, the chute was full of garbage, but I already emptied out the front part where the machine was. Out of there came the five bags of garbage that I put on the dolly."

Is that what you said?

A Yes.

MR. SHANDELL: I have no further questions.

THE COURT: Thank you, Mr. Merced. You may step down.

(Witness Excused)

MR. SHANDELL: Your Honor, at this time I would renew my offer of Plaintiff's Exhibit 6 for identification.

THE COURT: Refresh me.

MR. SHANDELL: It is the brochure, if your Honor please, which was distributed by Gulf and Western, and the basis of my renewal is there has now been testimony by Mr.

Danziger that within a year following the takeover by Gulf and Western this brochure was distributed, and we know now that the takeover was July, '71, so this brochure was distributed before the date of the accident.

THE COURT: I don't have any such recollection, but there are other problems, as I recall this document. To begin with, your client never would have received this in the normal course and no one, least of all him, says that he did.

Second of all, it was apparently disseminated to whoever it was disseminated and I would think it would be dealers such as the one listed on here, an outfit called Rodan or Bodan Industries on West 42nd Street here in Manhattan.

Third, there is no showing it has any relationship to our case in that there is no showing anybody either considered it or had reason to consider it at the time of installation.

Fourth of all, there is no showing it was even in print at the time of installation in building number seven in Southbridge Tower. I could go on but I believe that is sufficient to indicate why I am totally puzzled at the relevance of this document.

Even if you are correct that it came out some

months preceding July of '72, there is no showing it had anything to do with the installation of this particular compactor at building number seven, Southbridge Towers, Manhattan.

MR. SHANDELL: If your Honor please, my connection is that the defendants here had a continuing duty to warn and inform customers of their product, of dangers that might be encountered in the use of their product, even after the sale.

THE COURT: Perhaps that is one of your connections, but there has been no proof that anybody at Southbridge Towers received it. Stamped on the back is the address of the firm who received this, and there is absolutely not one shred of evidence that that concern on West 42nd Street had anything to do with the facts in our case.

It may well be that you could prove, and that's what I meant at the time when I sustained the objection to this, that somebody received this or that he should have received it and looked at it, but we have no such evidence at all.

MR. SHANDELL: The installer says he received it.

THE COURT: The installer says he received it, but Mr. Danziger isn't Southbridge Towers and Danziger isn't Auto Pak. So I don't know what you are talking about.

MR. SHANDELL: That my opinion --

THE COURT: I know your opinion.

MR. SHANDELL: I urge upon the Court that this is evidence of the dereliction of the duty just alluded to.

MR. KOHLER: I object to counsel making these speeches, your Honor.

THE COURT: I have ruled on it, Mr. Shandell. I have tried to give you several different clues as to what might be necessary to establish something to support your argument, but I have to say again that there is no such evidence that I know of in the record.

Now, what else?

MR. SHANDELL: At this time,your Honor, the plaintiff rests.

THE COURT: All right. This, then, would be a good time, ladies and gentlemen, to take a recess. This will probably take about fifteen minutes.

Counsel please remain.

(Jury leaves courtroom)

MR. SHANDELL: Your Honor, might we have one minute benefit of the recess before we commence our work?

THE COURT: No, there is no time like the present.

MR. SHANDELL: Might I prevail upon your Honor to yield to a call of nature?

THE COURT: Oh, if that is the problem, go ahead.

In the meantime, let me see Plaintiff's Exhibit 6 for another reason, would you, Mr. Chandell?

MR. IVONE: With respect to that item that has just been shown to the Court, on the back side in the lower left-hand corner you will see it shows 10-72. That is an October, 1972, issue.

THE COURT: That could be. I am not sure of that.

MR. IVONE: That is my general understanding of how printers operate.

THE COURT: I accept that possibility. Let me put it this way. There is no clear evidence that it came out before this accident. That I agree with you.

(Pause)

THE COURT: In your absence, it was pointed out that on Plaintiff's Exhibit 6 there is an indication, although there is no real assurance to this Court, since we haven't had any testimony to this effect, that this brochure may well have come out in October, 1972. I had overlooked that this time and I think it is a point well worth making. That is an additional reason.

I might also add that I don't see that this document has any probative value in the context of this case, but I wouldn't really want to be understood as ruling on that

basis. If it weren't for these other problems I think I would let you put it in even though I don't think it proves much.

I take it that counsel for Auto Pak moves to dismiss both the claim of breach of warranty, breach of implied warranty and negligent manufacture, right?

MR. IVONE: Yes, your Honor, and strict liability in tort. That is a separate caution.

THE COURT: I don't know what that means. As I see it, there are only two viable theories here. One is negligent manufacture or design and the other is the New York doctrine which is a form of strict liability, I believe, of breach of implied warranty and fitness for intended use.

So what you are talking about, if you are talking about anything besides those two, I don't understand you.

MR. IVONE: The complaint purports to set forth a separate caution in strict tort --

THE COURT: The complaint sets forth all kinds of things, but basically what we are talking about here, I believe, two theories, and if Mr. Shandell says otherwise I am going to disagree with him. I don't care what the complaint says. I have read that, too. It is a lot of repetitive now you see it now youdon't hugger-mugger. That's nothing.

gw/lf

Wouldn't you agree, Mr. Shandell, you have two theories of recovery, negligence and breach of implied warranty of fitness for use?

MR. SHANDELL: Your Honor, I am not at all sure. As a matter of fact, I think otherwise. I think I have three.

THE COURT: What is the third?

MR. SHANDELL: Strict liability under the New York doctrine of strict liability which I think is probably --

THE COURT: What is the New York doctrine of strict liability?

MR. SHANDELL: That is why I disagree I am limited to the doctrine of implied liability because I don't understand what the difference is. There may be differences as follows --

THE COURT: Let me put it to you this way, to the extent you are claiming anything other than negligent manufacture or a breach of an implied warranty of fitness for use of an object which a consumer or a remote consumer can rely on and which is a form of strict liability up to a point at least, those are the only two theories that I will seriously consider in this case.

MR. SHANDELL: In the negligence --

THE COURT: Exception to you if you think there is anything else.

MR. SHANDELL: In the negligence cause certainly there includes not only negligent design and manufacture but negligent failure to warn and give instructions as to use.

THE COURT: Fine, but I am not going into all that. I am simply saying negligence, simplistically, breach of implied warranty of fitness for use which a remote consumer understands certain circumstances may prevail upon. I do believe that is a form of strict liability as the New York courts view it but basically those are the two theories I will support you on at all. Everything else is just surplusage in the complaint, in my opinion.

Now, what's the motion, Mr. Ivone?

MR. IVONE: I was trying to get rid of these subsidiary items. I wanted to make it clear that there is also a claim of breach of an express warranty which I do not believe was proven here.

THE COURT: Absolutely not. It wasn't even attempted.

MR. IVONE: With respect to the claim of negligent design, your Honor, I think the leading case in New York on that would be Camo against Schofield, 301 New York --

THE COURT: Forget the case. I have them all in front of me. What is your motion?

MR. IVONE: The motion is to dismiss the complaint

on the ground of failure to prove.

THE COURT: I am going to reserve decision on that motion addressed to the negligence theoretically and put you to your proof if you care to put anything in. The federal rules as I told you several times off the record permit that deposition. That is the deposition on this branch of the case. What is negligence?

MR. IVONE: As to breach of implied warranty, I move further to dismiss the complaint on the ground that a defect has not been proven, a defect existing at the time of the delivery in 1970.

THE COURT: I understand you on that. I am not terribly sure there has been either, but I am going to reserve decision on that and put the issue to the jury after you have a chance to put in some proof.

Do you want to make a motion, Mr. Kohler?

MR. KOHLER: Yes, your Honor. I move to dismiss the complaint as to Auto Pak Division of Gulf and Western on the ground that Auto Pak was not the seller of the machine. The machine was sold in 1970 and Gulf and Western did not take title to Auto Pak until 1971. There has been no proof that Gulf and Western was in any way linked to the sale of this machine or to any of the maintenance of the machine. I see no reason why I am in the case.

THE COURT: I haven't understood what you are doing in this case anyhow. I don't get your theory here at all, Mr. Shandell, except to create mischief. How come you are suing Gulf and Western?

MR. SHANDELL: Gulf and Western is liable for the suits of Auto Pak.

THE COURT: Why?

MR. SHANDELL: Your Honor didn't let me put in the agreement that established that. I can prove corporate relationship. The answer is very simple, if your Honor please. Your Honor wouldn't let me put in the proof, but they bought Auto Pak lock, stock and barrel.

THE COURT: Right.

MR. SHANDELL: It was a bulk sale. Under the Bulk Sales Act, unless they perform certain legal requirements under the laws of the State of New York and they agreed this would be binding under the laws of the State of New York, it is in the contract, they remain liable for anybody who sues them thereafter.

THE COURT: Who remains liable?

MR. SHANDELL: The person who bought all the assets of a corporation going out of business.

THE COURT: Show me the contract and I may agree with you.

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(Mr. Shandell hands up document to Court)

THE COURT: Are you pointing to the provision?

MR. SHANDELL: Yes, sir.

THE COURT: It strikes me that it is quite the reverse of what you say. The seller agrees to pay and discharge in due course and will indemnify and save harmless Systems Company from and against all claims made by creditors of seller.

MR. SHANDELL: That may be but it is as between the two companies. As far as a creditor who has never been provided with the remedies provided under the Bulk Sales Act, I have my remedy against both of these contracting parties.

THE COURT: I must agree that it is really nothing but a legalism we are concerned with. It is all the same thing, really. I don't want to get the jury reading all these contracts. My heavens. I will deem this contract in evidence for purposes of this point, but I am just going to tell the jury it is one and the same thing.

MR. KOHLER: Your Honor, I would be willing to, but since I have a cross complaint against Auto Pak Company, Inc., I would be happy if your Honor would make a decision on my cross complaint against Auto Pak rather than leave that to the jury.

THE COURT: Fine. I don't understand why in the world you are making such a monumental to-do about all this. There must be some contractual provisions.

MR. KOHLER: Clause G of that same contract, I think it is on page 11 --

THE COURT: Yes, the responsibility of the seller?

MR. KOHLER: Yes. So on the basis of the contract I would ask --

THE COURT: I see what you mean now. Basically what's involved here looking at this contract is if there is a judgment against Auto Pak it is Auto Pak's responsibility.

MR. SHANDELL: Primarily, your Honor, I agree, but if Auto Pak can't meet its responsibilities then Gulf and Western remains liable.

THE COURT: All right, I'll keep them both in the case for purposes of effectuating any recovery here, but that's all.

MR. SHANDELL: That's all I care about, your Honor.

THE COURT: Why you wanted to try this out to the jury, I will never know.

MR. SHANDELL: I didn't. But I have to prove Gulf and Western's liability on the record.

THE COURT: Do you want to mark this contract a plaintiff's exhibit? It is an exhibit for the Court, not for the jury. All right? What do you want to mark it?

MR. SHANDELL: Plaintiff's exhibit whatever we are up to is fine with me, your Honor.

xxx (Plaintiff's Exhibit 8 received in evidence.)

THE COURT: Mr. Ivone, we know about your expert, of course, but fortunately there is not much left in the day and I think you said last evening you had several others.

MR. IVONE: Yes.

THE COURT: How many have you got?

MR. IVONE: I have definitely one and possibly two, your Honor.

THE COURT: Why don't we take a few minutes and then we'll resume.

MR. KOHLER: Your Honor, there was that item I mentioned to you after lunch.

THE COURT: Yes. Mr. Kohler wants to place something on the record here for our consideration. What is that?

MR. KOHLER: When I was taking the elevator down at the luncheon recess, the interpreter, Mr. Alvarez -- he seems to be gone now -- got onto the elevator with juror number four, I believe, Mr. Cass, and when the elevator

stopped at the tenth floor, they had been speaking as they got into the elevator, when the elevator stopped at the tenth floor, Mr. Alvarez started to show him what interlocks were on the elevator.

Mr. Alvarez is probably a very gregarious individual and likes to communicate with people. Yesterday when I was leaving he also had the forelady, Miss Stone, got on the elevator and Mr. Alvarez at that time was with the plaintiff and his wife and began to speak to the forelady about one of his children's musical accomplishments. How he learned that Miss Stone had something to do with music I don't know, since he wasn't here during the selection of the jury. But this interpreter, we don't know who he is or what his relationship to anyone is, but he certainly is injecting himself into this case.

THE COURT: I will instruct that no counsel, no agent of any party and no party will talk with any of our jurors during this trial. That includes the interpreter, of course, Mr. Alvarez, except to say politely good morning or good evening, period.

Will that solve the problem as best we can at the moment, Mr. Kohler?

MR. KOHLER: Your Honor, I think whatever damage has been done is done. Mr. Alvarez will no longer be needed

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during the course of this trial.

THE COURT: I have learned that you never can be sure of anything in this business and having seen all of you, I am fortified that this is a case not to be sure of anything at all. But, in any event, you brought it to my attention. I have said what I said and I will tell the jury, of course, again on several occasions not to decide the case on anything but what they heard in this courtroom and I would think that would take care of the problem. I am sure that there was nothing intentional about it, it was all friendly conversation.

Very good.

Take a few minutes and we will resume.

Gentlemen, Mr. Wilensky, like several others in this case, now informs me that he is seriously ill and would like to be excused. I would rather doubt that there will be any proof offered for the balance of the day that affects or pertains to his client. Isn't that a fair assumption, Mr. Ivone?

MR. IVONE: Yes, your Honor, as far as I know there should be nothing against his client. As a matter of fact, if Mr. Shandell is prepared to represent now that there is nothing wrong with respect to the repair and maintenance of the machine in question, and that is the only reason Mr.

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Wilensky is here with his client, because they had the contract of repair --

MR. WILENSKY: It was on a call basis.

THE COURT: That is a detail. Let's not worry about that.

MR. IVONE: It is an agreement.

THE COURT: Go ahead. What were you about to say?

MR. IVONE: I was about to say, since his client is the company that had the agreement with Southbridge to be on call for repairs and maintenance and, in fact, there was apparently some repair and maintenance about a month before this accident, if Mr. Shandell represents there is going to be no claim whatsoever that there is anything wrong with the repair and maintenance of the machine, I will be prepared to withdraw the impleader of Charter Contracting.

THE COURT: Nobody said a word about anything that they did, let alone say there was anything wrong with it. I don't know why they are in the case.

MR. SHANDELL: Neither do I.

MR. IVONE: They are in the case because the complaint was of a failure to maintain and repair. We found out who were the people that repaired and maintained.

THE COURT: There has been no proof of any failure

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to repair and maintain, not at all.

MR. IVONE: I don't either. If Mr. Shandell will state he is not going to make any further claim here --

THE COURT: I don't see how he can. We heard his case. Wouldn't you agree, Mr. Shandell, there is no claim that Charter or there was any failure of maintenance or repair at the time?

MR. SHANDELL: As far as I am concerned, your Honor, this machine on the day of the accident wasn't any particularly different from the day it was built.

THE COURT: That's right. You had better say that because of the law of New York. Otherwise, you are in real bad trouble against the manufacturer.

MR. SHANDELL: Exactly.

THE COURT: I don't see why, then, we can't all agree that Charter ought to be released.

MR. IVONE: I am agreeable.

MR. WILENSKY: There are cross complaints on a third party action amongst the third party defendants.

THE COURT: Yes, there are bushels. This is like a case of eels.

MR. WILENSKY: May I ask the defendants if they are willing to stipulate to a discontinuance against Charter?

THE COURT: Such as who?

MR. WILENSKY: Southbridge, I believe, and Universal have cross claims on the third party action.

THE COURT: I am sure they probably have. There is a bushel of them here. What do you say, gentlemen?

MR. REGAN: I will agree.

THE COURT: Your client is, for the record --

MR. REGAN: Universal.

THE COURT: You have no claim against them, so you withdraw?

MR. REGAN: Yes.

THE COURT: What about Southbridge?

MR. ISAAC: I am a little slow in my thinking processes. This is what is crossing my mind. I ask you to bear with me a few moments. I will ask you whether it makes sense to you as the judge in the case.

THE COURT: I am not arguing with you, Mr. Isaac. All I want to know is an answer to what Mr. Wilensky just asked. If your answer is you will not withdraw your cross claim, so be it. He is entitled to know.

MR. ISAAC: Maybe I can do it a different way. I am trying to expedite this if I can.

THE COURT: It sounds to me like your intentions are good but your follow-through is poor. You do not wish to withdraw Southbridge's cross claim against Charter, is

that correct?

MR. ISAAC: I will under a certain condition. The condition is there be a stipulation, the jury can hear it, at the appropriate time by any lawyer that there was a company that was on call in case there was any work necessary to be done on that machine. That may be somewhat relevant to my case.

THE COURT: All you have to do is put one of your people on to say that.

MR. ISAAC: I don't know if I am going to put anybody on the stand at this moment. That is why I don't want to prejudice my case.

THE COURT: I don't want to get into any [illegible]. If you don't want to drop your cross claim, fine, don't drop it.

MR. ISAAC: I am sure Mr. Wilensky has no idea, but at this moment --

MR. WILENSKY: May I also indicate there is a statement that was marked as an exhibit, Mike Herman's statement. There was no objection to it. It contains the elements of what Mr. Isaac is discussing at the present time with reference to the operability of the machine and the fact the machine had been working.

THE COURT: That may well be. May I suggest that

at least, Mr. Wilensky, you know enough now so I don't think your client's interests will be related to or referred to this afternoon and if you feel that you can leave, that is your business.

MR. WILENSKY: Do I take it, your Honor, that the third party action --

MR. IVONE: Don't take anything any more. Mr. Isaac having refused to discontinue, your Honor, it would be inappropriate for me to discontinue now. I will simply have to hold him until Mr. Isaac says discontinue.

THE COURT: Let's take a few minutes.

MR. WILENSKY: With your Honor's permission, I will leave for the afternoon.

THE COURT: It is not my permission. It is up to you. It doesn't seem to me your client's interests will be prejudiced.

MR. WILENSKY: Thank you.

(Recess)

(Jury Present)

THE COURT: I apologize for the delay, which was longer than I guessed, ladies and gentlemen, and part of it was my fault in the sense that I was asked to participate in another case briefly when I stepped outside of the courtroom a moment or two ago.

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However, we are now ready to proceed on the defendant Auto Pak's case, and, Mr. Ivone, I believe you have a witness.

MR. IVONE: Yes, your Honor.

Mr. Rivera, please take the stand over there.

L U I S R I V E R A, called as a witness by the Defendant Auto Pak, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. IVONE:

Q Mr. Rivera, back in 1971, were you employed by Southbridge Towers?

A Yes, I was.

Q And when had you begun working for them?

A The exact date I don't recall. It was about -- it was September 26, I believe, of '70, somewhere around there.

Q Of 1970?

A Yes.

Q Would you try to keep your voice up a little bit more?

A Yes.

Q Now, was there also, sometime in 1971, an employee there by the name of Felix Merced?

A Yes, sir.

Q When did he come there, do you recall?

A The exact date I don't recall, but it was around that year.

Q In 1971?

A Correct.

Q Was it in the early part of 1971, do you recall?

A If I do correctly, yes, it was in the early part of '71.

Q What were your duties?

A I was assistant superintendent of the whole complex.

Q And this is a complex down here, the Southbridge Towers, you are talking about?

A Right.

Q When you say assistant superintendent, will you tell the Court and jury what that means? What were your duties?

A My duties as assistant superintendent is to hire, fire and maintain discipline and everything in the building.

Q You say maintain everything in the building. What do you mean by that?

A Anything that was given to me broken by tenants

or the office, it was my duty to take care of or send someone to do it.

Q Did those buildings also have certain things known as the Gobbler or an Auto Pak compacting machine?

A Yes.

Q Was there one in each building?

A Correct.

Q Now, did there come a time around the early part of 1971, if you recall, when Mr. Merced -- withdrawn.

What were Mr. Merced's duties?

A He was a porter.

Q What are the duties of porters at that time in that particular complex?

A The duties of a porter is as follows. He is to maintain the place clean, run the compactors and any other duties that was assigned to them.

Q He was hired as a porter, is that it?

A Correct.

Q So that it was his duty, was it not, to run the compactors?

A Excuse me?

Q It was part of his duties to run the compactors?

A Yes.

Q You say this took place in the early part of

1971?

A Correct.

MR. SHANDELL: Objection. Objection to counsel leading the witness.

THE COURT: I don't see any harm. You are right technically but there is no harm. Let's go ahead.

Q Do you recall which building Mr. Merced was assigned to during the time that you were there?

A He was assigned to several of the buildings, like five, two, three, seven.

Q And in each of those buildings there are compactors?

A Yes, sir.

Q And with respect to each of those buildings, was it part of his duties to run the compactor?

A Yes, sir.

Q By the way, did there come a time that you left Southbridge, you, yourself?

A Yes, I did.

Q When was that?

A That happened in December abour four years back, more or less.

Q December of '71 you left?

A Correct, '71.

Q When Mr. Merced came and got his job as a porter and, as you said, one of his jobs was to run the compactor, did you or anyone else give him any instructions concerning the operation, the maintenance and safety aspects of the compactor?

A Yes, we did.

Q You answered, "Yes, we did."

Did you personally give him any instructions?

A Yes, I did.

Q Did anybody else give him any instructions besides yourself?

A Yes, three other people.

Q Who are the three other people?

A My superior.

Q Who is that?

A Mike Herman. Manny Diaz and Sulliverez. We call him Cris.

Q Now yourself, do you speak Spanish?

A Fluently. The same way I speak English.

Q How about Mike Herman? He doesn't speak Spanish, does he?

A No, he doesn't.

Q Was he able to give any instructions personally to Mr. Merced?

A When he did so, he either went with one of us to make sure he did understand, and he always understood whenever anything was told to him in English.

Q In English?

A Yes.

Q You mean he was able to communicate in English?

A Yes.

Q So that there could be communication between Mr. Herman and Mr. Merced in English, is that correct?

A Yes, sir.

Q Perhaps not as easy as Spanish?

A No, not as easy as in Spanish, but you could communicate.

Q How about Mr. Diaz, he speaks Spanish, is that correct?

A Correct.

Q Does he also speak English?

A Yes, sir.

Q How about Mr. Sulliverez?

A The same way.

Q When you say that you gave instructions to Mr. Merced, what instructions did you give him?

A When you say "instructions," could I ask you one question?

Q Yes.

A Specifically what are you talking about?

Q Let's talk about first how to operate it. Let's break it down.

A The operation of the machine?

Q Yes.

A We showed him how to put the bags in --

MR. ISAAC: Speak up a little louder, please.

A How to put the bags in, how to operate the machine, which is only three switches, and in case of any emergency or anything he was instructed to close the machine. When we say close the machine means turn the power off and under no circumstances to put anything else in the machine.

Q When you say under no circumstances to put anything else in the machine, what do you mean by "anything else"?

A In other words, unless they gave us a call, to us three, not to do anything else to the machine.

Q Other than trash or garbage?

A Correct.

Q You said there were three switches. What three switches are you referring to?

A Well, it is the main switch, which is a box which

is approximately three feet away from the middle of the compactor, this one which is about two feet away, which is a dual switch on there.

Q You mean the one on the compactor itself?

A Yes.

Q You said that is a dual switch?

A Correct. It has a switch which turns it on and off and plus a switch that you could -- that operates no matter how you turn it, you could turn it on and off and it goes automatically. You have to hold your finger in order to maintain it on.

Q Are you referring to the reverse switch?

A Correct.

Q In other words, if you maintain your finger on it, it will go into reverse, is that correct, the ram?

A Right.

Q And then if you maintain it -- if you want to move the ram to a position to go backwards, you would put your finger on that button, is that correct, and make it go back?

A Yes.

Q And then you could shut the machine, which would keep the ram back in that machine if you want it all the way back and to stay there?

A Yes. You could push it as far as you want or forward as you want.

Q Could you shut off the main switch then on the side?

A Correct.

Q Now, that is what you told him as to how to operate it.

Mr. Rivera, did you tell him anything with respect to safety?

A Yes.

Q What did you tell him?

A Under no circumstances put your hand or anything inside the machine.

Q Well, when you say under no circumstances should he put his hand or anything in the machine, do you mean that when it is operating or not operating?

MR. SHANDELL: Objection, your Honor. I object to counsel leading the witness on this point.

MR. IVONE: That is not leading.

THE COURT: It is not so much what he meant. What did he say specifically to Merced?

Q What did you specifically say to Mr. Merced concerning safety as you have just been discussing?

A Not to put your hand inside the compactor under

no circumstances and not to put any object in there unless we know what it was.

Q You just said, "Unless we know what it was." What do you mean by that?

MR. SHANDELL: Objection, your Honor.

THE COURT: Again, it is broadly put. I think the objection is well taken. First of all I think you want to know who is "we."

Q Who did you mean by "we"?

A When I say "we," you see, there was always a man in station in the main office, which it was Mike Herman. So he either had to see him or myself.

Q Let's suppose for the moment that something has gotten stuck in the machine and the machine is still operating. What were your instructions to Mr. Merced to do?

MR. SHANDELL: Objection, your Honor. He is leading and suggesting things to this witness. He gave instructions to this witness. Now he is suggesting other instructions.

THE COURT: I will sustain the objection as to form. In substance, the question can be asked. Rephrase it.

Q Did you give Mr. Merced any instructions concerning what, if anything, he was to do --

MR. SHANDELL: I object to counsel leading and

suggesting answers to this witness.

MR. IVONE: Let me finish.

MR. SHANDELL: Why doesn't the witness tell us what the instructions were.

THE COURT: Just a moment, Mr. Shandell. Let's see if we have exhausted his memory and then you can put a direct question to him.

Q What were the instructions you gave Mr. Merced concerning safety?

A The instruction was not to put your hand in there, not to put anything in there, and in case something went wrong with the machine he would have to get in touch with one of us. When I say one of us, I meant Mr. Herman or myself.

Q In giving instructions to Mr. Merced, did you also show him physically the machine and how to operate it?

A Yes, we did.

Q Again when you say "we," who do you mean by "we"?

A Mr. Herman and myself.

Q By the way, were there any classes of some type that were given?

A We were giving at least twice, three times, between three and four times a month there was a meeting held and

everybody was shown. Not as an individual, as a group.

Q What did these group classes consist of?

A Of any problems which consists of any problems that was brought up in general by the workers.

Q Who would give these classes? Who would be the one speaking?

A Myself.

Q In what language did you speak?

A English and Spanish.

Q Did Mr. Merced attend these classes?

A Yes, he did.

Q Did you eventually learn that Mr. Merced had sustained an accident?

A I learned it after I was out of Southbridge.

Q You told us that you left in December of '71?

A Yes.

Q Eventually you learned that he did have an accident?

A Yes.

Q Did you have occasion to see him after that accident?

A I did.

Q And where did you see him?

A In the hospital.

Q And did you talk to him in the hospital?

A Yes, I did.

Q What did he say to you?

A As I recall, when I went into the hospital I tried to, you know, not mention anything that was happening, and eventually a little bit came out but I tried to stay away from it. As far as I remember, he got his hand cut in the compactor.

Q Did Mr. Merced ever tell you that he was hit in the head with a bottle?

MR. SHANDELL: Objection, your Honor.

THE COURT: At this point I will sustain the objection. Again, see if we have exhausted his recollection and then you can be more pointed in your questions. Let's first exhaust his recollection.

Q Do you recall anything else he may have said?

A No.

Q Did he ever say to you that he had been hit in the head with a bottle?

MR. SHANDELL: Objection.

THE COURT: Overruled.

A No, he never mentioned anything to me about that.

Q Building number seven, do you recall how many stories that had?

A Seven floors.

Q The machine, the compacting machine in that particular building, was that on all the time or was it shut at certain intervals?

A If a man is not there watching it, it is closed, shut off.

Q Was it kept on or off at night?

A No, there is a man running it at night, so it is kept off.

Q I don't quite understand you. You said there is a man running it at night so the machine is kept off.

A No. I got confused. The machine is kept off but there is a man -- there is a man 24 hours a day on the machine.

Q I am trying to find out if the machine was kept on or off during the night in building seven.

A Yes.

Q Which one, on or off?

A Off.

Q In the morning, then, it would have to be turned on, is that correct?

A Correct.

Q And when it was turned on in the morning, other than turning it on was there anything else that a porter had to

do at that point?

A Yes.

Q What?

A They would have to pick up garbage from the different floors.

Q He would have to pick up garbage?

A Besides his duty of cleaning off the compacting machine, you have to pick up garbage from the floors.

Q Was he required, after he turned it on, immediately after he turned it on, to open the hopper door?

A No.

Q Was he required immediately after he turned it on in the morning to open the hopper door and continuously push up and down, up and down, with a stick to make the garbage fall down the chute?

A No.

Q When he turned the machine on, I believe you just told us that he would then go through some of the upper floors to pick up garbage, did you say that?

A Could I ask? I misunderstood one thing. Just to explain. He would turn the machine on but he cannot leave the room. He would have to maintain himself in the room.

Q All right. And he would stay in the room and do what?

A And watch the machine. It is like sausage bags.

Q He would watch the bags fill up, is that it?

A Correct.

Q And what were his duties then?

A He will tie up the sausage bag as it comes out.

Q As it is tied up, he would take one of the bags and put it some place?

A Put it on top of a truck to take it out.

MR. IVONE: That's all I have.

THE COURT: Mr. Isaac?

MR. ISAAC: One question if I may, sir.

CROSS EXAMINATION

BY MR. ISAAC:

Q I want to clear up one point. You are no longer connected with Southbridge Towers, is that right?

A No, I am not.

Q What do you do now? Maybe I should say what is your occupation or profession at this time?

A Superintendent of Independent Plaza.

Q Here in New York?

A Yes, 300 Greenwich Street.

Q When you were working for Southbridge Towers, what was the title that you had?

A Assistant superintendent.

Q Who was above you in that chain?

A Mike Herman.

Q And who was below you in that chain?

A Sullivarez.

Q And below Sullivarez was whom?

A Sullivarez and Manny Diaz.

Q And below him were the porter and handymen, is that correct?

A Correct.

Q Were you the boss -- when I say "the boss," the supervisor of the porters and handymen?

A Correct.

MR. ISAAC: Thank you.

THE COURT: Mr. Regan?

MR. REGAN: Nothing.

THE COURT: Mr. Shandell.

CROSS EXAMINATION

BY MR. SHANDELL:

Q Mr. Rivera, before going on the stand here today to give your testimony, have you discussed this case or what you would say in response to questions with anybody?

A No, I haven't.

Q You haven't. So that what you told Mr. Ivone

in response to his questions was a complete surprise to him, is that right?

A Yes.

THE COURT: What?

MR. SHANDELL: A complete surprise to him.

THE COURT: How can he say what is a complete surprise to somebody else. Objection sustained.

Q Mr. Ivone had no way of knowing what you would say because you never discussed your testimony with anybody, is that correct?

A I never discussed anything about this case with anybody.

Q When you were standing out in the hall with Mr. Ivone's assistant you weren't discussing the case with him?

A I didn't discuss the case with anyone here.

Q When you were standing with Mr. Isaac's assistant, you weren't discussing the case with him?

A No, sir.

Q So neither of those two gentlemen had any way of anticipating what you might say here today, is that correct?

A No.

Q Tell me, sir, when you instructed Mr. Merced in the operations of this compacting machine, how did you gain the knowledge that you passed on to him?

A I obtained it when I first went into the building from the people who were servicing the machines, who in turn showed us how to run it.

Q And what did they show you about how to run it?

A They gave us a booklet, they explained and showed us how the machine worked, what was the function of the machine and what was the purpose of the machine.

Q That booklet they gave you, did it have an orange cover?

A Right offhand, I don't recall.

Q In any event, was there anything in that booklet about how to make the garbage process?

A When you say the process of the garbage, you lost me on that one.

Q Was there anything in that booklet which said what an operator of the machine was supposed to do?

A Yes.

Q What did it say?

A I can't quote the book correctly.

Q Just substantively.

A Okay. It tells what switches to turn on, how to turn it on, just stand there and watch the machine.

Q Did you direct the porters that they were to stand and watch the machine while it was in operation?

A Correct.

Q Where did you get the information that this machine required a porter to stand and watch it while it was in operation?

A Well, very simple. If I don't watch the machine, if it breaks or something happens to the machine, I must have a man in there to turn it off.

Q So you kept a man there watching the machine whenever it was going in case it might break?

A No. Because he has to take out the garbage. The sausage only goes so big and after that it will go on the floor. So you have to compact it, put it in the bag so you can dump it.

Q How long would it take the machine to fill a sausage bag?

A It all depends how much garbage is in the machine.

Q Did anybody ever tell you you should keep that machine turned on continuously so that garbage wouldn't build up in the machine?

A That's what they might assume, but no.

Q Nobody told you that?

A No.

Q Where did you get the idea that you should turn the machine off except for periods during the day when a

porter was there watching it?

A The people who came over to service the machine.

Q Told you that you should keep the machine off except when the porter was watching it?

A Correct.

Q Did they tell you why a porter had to watch it?

A Well, if you don't watch it, the bag will be spilled on the floor and then you have double work.

Q I ask you again, how long does it take that machine to fill up a bag?

A It all depends how much garbage is in the machine.

Q Would it take two hours, three hours, one hour, five seconds, how much, approximately?

A Approximately five minutes, ten, fifteen. We go back, it all depends how much garbage is in the machine.

Q In any event, you found that these bags would fill up in a matter of five to fifteen minutes?

A Approximately.

Q So that in a two-hour period one would fill somewhere between eight and 24 bags?

A More or less.

Q So your porter had to be constantly tying off bags because he had up to 24 bags to get out in two hours, right?

A Right.

Q You said something about a machine breaking and the porter would have to be there. Did you say that, sir?

A Yes.

Q Tell me, did you have a porter watch the boiler room to make sure the boiler didn't break?

A That was my job.

Q You watched the boiler whenever it was working to make sure it didn't break, is that right?

A Every hour on the hour.

Q You stood and watched it?

A No, I went and checked it.

Q These porters, they weren't allowed, you told Mr. Ivone, to leave that compacting room even to get some work done in the elevator or some work done right out in the hall, they had to stay there for the entire time the compactor was running, did you tell Mr. Ivone that?

A They had to stay in the room.

Q For the entire time that the compactor was running?

A If they had to walk out for any reason whatsoever, turn off the machine.

Q And was that because if a porter wasn't there the garbage used to stick above the electric eye and he was required to go in there and unstick the garbage?

A Not precisely.

Q That wasn't the reason?

A No, not precisely the way you put it.

Q Isn't it correct that the reason the porters were required to be in that room was that you found when a porter wasn't attending that machine the garbage would stick above the electric eye and if there was nobody around to unstick the garbage then the machine would stop processing garbage? Is that true or untrue?

A I have to answer in which particular building you are talking about.

Q In any building.

A No.

Q So that if Mr. Herman, your supervisor, testified that the reason you decided to run the machine only when a porter was around was to make sure the garbage would all down to the electric eye, that would not be true, is that correct?

MR. ISAAC: I object.

A That is wrong.

THE COURT: I don't recall Mr. Herman's testimony.

MR. SHANDELL: I will read his testimony, if your Honor please.

Q Page 35 of the minutes of the trial. Do you

agree with these statements, sir?

MR. ISAAC: 35 of what?

MR. IVONE: Minutes of the trial.

THE COURT: Go ahead. This is on February 3rd, right?

MR. SHANDELL: This is on February 3rd.

THE COURT: Go ahead.

C Question of Mr. Herman. Do you agree with these statements?

"Q Did the representative from Auto Pak tell you that you could turn it off and turn it back on during the day?

"A Yes, he say we can leave this on long time, you know. But we find out later was no good, leave the machine on. We tell the guy use this only if there is garbage in it, because we find out many times the machine was running and the garbage was stuck on top, you know. Was only a little paper blocking the eye.

"THE COURT: You are talking about the electric eye?

"THE WITNESS: Electric eye. That's why the machine was going on and off without garbage falling to the piston.

"THE COURT: Do I understand you to be telling

"us that after the experience there came a time when you only operated it for certain periods during the day and the night?

"THE WITNESS: That's right, yes.

"THE COURT: When were those periods, sir?

"THE WITNESS: It was morning, afternoon, evening. Depending on how much garbage was built up in the chute.

"THE COURT: All right.

"Q Do I understand, Mr. Herman, when the representative of Auto Pak came around he said you should leave it turned on a long time and that you later gathered from your experience that it was just better to turn it on in the morning, the afternoon and the evening, is that right?

"A Yes.

"Q And that was because if you did not have a porter around the garbage would stack up and would come down to the electric eye and the machine would stop, is that correct?

"A I don't have the question."

The Court asked me to rephrase it.

"Q Did you tell his Honor a moment ago, that the experience that led you to turn this machine on only in the morning, afternoon and the evening had something to do with the paper getting stuck up and the electric eye not working; did you tell his Honor that just before?

"A Yes, sir, he was told."

MR. IVONE: Your Honor, I assume he is going to pose a question eventually, but is it fair to have such a long lengthy dissertation of reading and then ask someone to answer it?

THE COURT: I assume as you do, too. I hope we will come to the end of this. Let's see what happens.

Q "Q What was stuck?

"A If the garbage doesn't fall down the machine does not operate, you know.

"Q If a porter wasn't there to make sure the garbage would fall down to the electric eye, then the machine would not operate; is that correct?

"A Yes, sir.

"Q And is that why, Mr. Herman, that you decided to run the machine only when a porter was around?

"A That's right."

Is that true or untrue?

MR. IVONE: Objection.

THE COURT: Sustained.

Q Is it true --

THE COURT: Sustained. There is a tried and true way of doing this. Please.

Q Is it correct that the reason it was decided to run the machine only when a porter was around was that if

there was a porter not there to make sure the garbage would fall down to the electric eye then the machine would not operate?

MR. IVONE: Objection.

THE COURT: Sustained. Again I tell you, and it is the last time, there is another way of doing this. You have a fair question, but you have got to phrase it differently

Q If Mr. Herman testified that the reason it was decided not to run the machine --

THE COURT: Sustained as to form. We have heard it ad nauseam. That is not the point.

You have heard all this of Mr. Herman which has been read to you correctly, by the by, would you agree or disagree with that?

THE WITNESS: I would agree.

THE COURT: Next question.

Q As a matter of fact, sir, did you tell Mr. Ivone that the instruction you gave to Mr. Merced was not to put any object in the machine?

A Yes.

Q And that means anything, not to put anything into the machine?

A Not to put anything in the machine unless we knew about it.

Q Well, then, these sticks that you gave to the porters, they weren't to put those in the machine either, were they?

A Could I see that, sir?

Q They were not to put those sticks in the machine, were they?

A You see, that we allowed.

Q You allowed the porters to use these sticks to shove it up into the machine to break up the blockages that used to occur in those machines, isn't that correct?

A In building seven it is almost impossible.

MR. SHANDELL: I move to strike the answer as not responsive.

THE COURT: Yes. Would you mind repeating the question very much slower than you did last time?

Q You allowed the porters to use these sticks to push up into the machine to break up theblockages that used to occur, isn't that correct?

A Yes.

MR. IVONE: Is that building seven we are talking about?

THE COURT: I don't understand.

MR. IVONE: Then I must ask --

THE COURT: We will get to it.

MR. SHANDELL: We will get to it.

THE COURT: Let's go ahead.

Q Do you say that that used to occur but not in building number seven?

A No. What I am trying to explain, you see, when you talk you talk in general about the whole place. You are not specifying.Each building is entirely different.

Q Are you saying that in building number seven no stick was required to break up the blockages in the machine in order to make sure the garbage came down?

A Building number seven it was required to you to go upstairs and push it down.

MR. SHANDELL: I move to strike the answer as not responsive.

THE COURT: No, I don't agree with that.

Q Is it true no stick was required to push up into blockages to break up the blockages?

MR. IVONE: Objection. He is not saying the stick is not required. He said it is not required to push upwards.

THE COURT: In any event, I think the witness has answered the question. Next question.

Q Isn't it a fact that each of these compactors was equipped with a stick provided by Southbridge Towers for

breaking up blockages?

A They weren't provided by Southbridge. They were just found around.

Q Who found them around?

THE COURT: The porters in each building usually had a stick like this available?

THE WITNESS: Correct.

Q Weren't they issued by Southbridge?

A No.

Q So that you would disagree with Mr. Herman if he said --

MR. IVONE: Objection to the form, your Honor. The way it is begun.

THE COURT: I certainly would prefer if you are going to read from Mr. Herman's at trial, read it and then ask him if he agrees.

Q I read from Mr. Herman's testimony at the trial and I ask you whether you agree with it. Page 37.

"Q And did you issue the porters sticks in connection with their operation of the electric eye?

"A Yes."

Do you disagree with that?

A When I was there we didn't give no sticks.

Q When you were there he didn't give them sticks?

A That's correct.

Q So that if they were given sticks they were given thes sticks after you left Southbridge Towers, is that correct?

A After I left, yes.

Q And when did you say you left?

A Approximately four years back, in December.

Q December of 1971?

A Sometime around there.

Q And in December of 1971, how long had it been that Mr. Merced had been working for Southbridge Towers?

A He took a leave of absence of several months.

Q Was he there again by the time you had left?

A No.

Q You left before he came back?

A Correct.

Q When he was there before, while you were working there as assistant superintendent, for how long had he been working before he took his leave of absence?

A The specific time I can't remember, but it was several months, quite a bit of months, eight, nine months.

Q How long?

A About eight or nine months.

Q Eight or nine months. So how long was he away on

leave of absence as of the time when you left?

A I couldn't tell you how long after I left he came back.

Q I didn't ask you that. I want to know how long he had gone on leave of absence up to the time you left your job at Southbridge Towers.

A About three to six months, somewhere around there.

Q So sometime after you left in December. Mr. Merced had left on leave of absence between July and September, is that right?

A Yes.

Q When had he started his job?

A Excuse me?

Q When had he started his job?

A The first time?

Q Yes.

A It was sometime in the early part of the year.

Q Do you remember where?

A Exactly, no, I wouldn't be able to tell you.

Q So you can't tell us how long he had been working as of the time he left on his leave of absence?

A You l[illegible] me on that one.

Q So you cannot tell us how long he had been working

as of the time he left on his leave of absence?

A I am lost. How long did he work before he left?

Q Yes.

A He worked there about eight or nine months, somewhere around there.

Q If he left in July, that would have meant he would have come sometime in the fall of 1970. Did he come that early?

A I don't recall exactly the date.

Q Well, approximately.

A I don't know. I won't say because I don't know.

Q So if you don't know when he came what is the basis of your saying he worked there eight or nine months?

A I say approximately.

Q Possibly as little as two or three?

A It could be possible.

Q Did you say Southbridge Towers had a training program?

A You would call it so, yes.

Q Did you have a system where a new porter was on probation or something?

A Yes.

Q You sent him around to various functions and showed him how to do various things?

A He was sent with someone else who already knew the functions.

Q And that someone else had to teach him the functions, is that right?

A It depends which one.

Q Who did Mr. Merced go with?

MR. ISAAC: Did he have a function at the time, Judge?

THE COURT: Rephrase it.

Q Let's put it this way. Who was Mr. Merced with?

A Depending on the job he went to do.

Q Was he given various things to do?

A Yes.

Q In various buildings?

A Yes.

Q Did some of those buildings have more than one porter?

A Yes.

Q So in some of those buildings there was an experienced man already running the compactor, right?

A Correct.

Q At least for a period of time Mr. Merced would be a probationer or on-approval person or trainee, right?

A Yes.

Q And he would watch this other man run the compactor, is that right?

A And assist h'm.

MR. ISAAC: What?

MR. SHANDELL: And assist him.

Q How long did this period last back in 1971 at Southbridge Towers?

A The period of the man or the period of the particular job he was doing?

Q The period before he became a full-fledged porter.

A Approximately 90 days.

Q And do you know whether Mr. Merced put in his whole 90 days before he took his leave of absence?

A No, I couldn't answer that.

Q And by the time he came back you were gone?

A Correct.

Q So whatever instructions were issued about the running of the compactor when Mr. Merced came back, they weren't being issued by you?

A Correct.

Q And the only instructions you ever issued to him with respect to this compactor were issued before he went on his leave of absence, is that correct?

A I missed something there.

Q The only instructions, Mr. Rivera, that you ever issued to Mr. Merced were issued before Mr. Merced went away on his leave of absence, right?

A Correct.

Q And the instructions that you issued about safety you told Mr. Ivone were don't put any object in there unless you or Mr. Herman knew about it, is that right?

A Yes.

Q So that if somebody gave him instructions about using a stick in there to break up blockages, that was after you left, is that right?

A Correct.

MR. SHANDELL: I have no further questions.

THE COURT: Anything else, gentlemen?

REDIRECT EXAMINATION

BY MR. IVONE:

Q Mr. Rivera, were you subpoenaed to appear here today?

A Yes, sir.

MR. IVONE: That's all.

THE COURT: Thank you, Mr. Rivera. You may be excused.

THE WITNESS: Thank you very much.

(Witness Excused)

THE COURT: Ladies and gentlemen, it is getting close to 4:30, so we'll suspend now. As I said, we w'll not sit tomorrow. Therefore, you are not compelled or requir-d to come to the building at all. You are free to go about you. other business. From what I can see and what I have been advised by counsel, it would appear there is an excellent chance we can get the proof finished and put the initial question of liability to you to decide with suitable instructions from the judge on Monday. At least that's our hope and expectation. So put the case out of your mind entirely and don't talk about it with anybody outside of the courthouse or in. Enjoy the weekend and we will see you Monday morning at ten o'clock.

(Jury leaves the courtroom)

(Adjourned to 10:00 a.m., February 10, 1975)

gw/lf 591

FELIX MERCED

vs. 73 Civil 1621

AUTO PAK et al.

February 10, 1975
10:00 a.m.

(Trial resumed - jury present)

THE COURT: Good morning, ladies and gentlemen.

Mr. Ivone.

MR. IVONE: Yes, your Honor. Shall I call my first witness?

THE COURT: Please do.

I R V I N G D E U T S C H, called as a witness on behalf of Defendant Auto Pak Company, Inc., having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. IVONE:

Q Mr. Deutsch, would you please tell the Court and the jury the nature of your business?

A Yes. I am a licensed professional engineer in the State of New York and New Jersey. I hold certification by the National Counsel of Engineering Examiners, which in effect permits me to practice in all of the states of the Union.

Q When did you become so licensed? When were you licensed?

A I was licensed in about 1953.

Q Would you tell us something about your schooling and background?

A Yes. I had my Bachelor's degree in mechanical engineering from the Univeristy of Texas in 1943. I have a Master's degree in chemistry from Adelphi University. That was in 1957, approximately. I worked for the Westinghouse Electric and Manufacturing Company doing research on high temperature materials and in metallurgy in 1943 to '44. Shortly after that I went to work -- I was in Pittsburg. I wanted to get home. I went to work for the Western Electric in Bayonne, New Jersey, as a production engineer. This had to do with work in connection with production equipment, such as drill presses, punches, punch presses, soldering, et cetera, and it was our job to route the product line -- in this case it was radar sets -- so that we would get the most economical and fastest and best production we could and checks on equipment and so on.

Following that, I went into the United States Navy and worked on rockets for a year in Inyokern, California, and leaving there on discharge I went to work in 1948 for the Long Island Lighting Company. I stayed with the Long

Island Lighting Company for 20 years. I was -- for five years, the early five years, I was connected with construction of gas lines and equipment and plants and so on which had to do with heavy duty equipment. I worked in the gas plants. These are production plants. Which again brought me into contact with heavy equipment, drill presses and all sorts of disposal equipment, crushers and so on that were used for coal hoppers and what not.

In 1968, I left the Long Island Lighting Company and I became the director of engineering for the New York Testing Laboratories. This is an independent testing laboratory having most of their business in the aircraft industry, that is, testing parts and components such as X-ray testing, impact tests, et cetera, safety tests for the aircraft industry.

After a year with the New York Testing Lab, I became the vice president of the New York Testing Lab and remained there for two years. So I was with New York Testing Lab for a total of three years, two years as vice president. This brought me into contact with a lot of what we call failure analyses. This has to do -- or accident investigations. It has to do with investigations of parts that fail, accidents and conditions in accidents that cause accidents, cause failure of parts. I was an officer in the System

Safety Society. The System Safety Society deals with a system's approaches to safety and makes an effort to try to avoid accidents in equipment and to look at the entire unit.

In 196 -- this brought me also into contact with such equipment as compactors, garbage compactors, on both the road compactors for garbage trucks, these late type compactors and several accident investigations regarding those. It also brought me into contact with the testing for New York City approval of compactors, garbage compactors that were used to replace incinerators in New York City in apartment houses and so on, in plants. I tested several of these in the City of New York.

I left in 1968 and I formed my own company called Deutsch Engineering and Testing Services in '68 to the present time and I have been doing essentially the same work that I did at the New York Testing Laboratories.

Q Mr. Deutsch, were you requested by my office to examine a particular compacting machine at the Southbridge Towers here in New York City?

A Yes.

Q And that was in connection, was it not, with an accident that had occurred to a certain Mr. Merced?

A Yes.

Q Did you look at the machine?

A Yes.

Q And about when was that?

A It was the latter part of last year.

Q Do you have any notes that you could refresh your recollection on?

A Yes, I do.

Q Do you want me to get them?

A Yes, it might be a good idea.

Q Do you have your briefcase back here?

A Yes, in the last seat there, next to the last seat.

(Briefcase handed to witness by Mr. Ivone)

A On November 21, 1974.

Q Do you recall about what time of the day it may have been that you examined the machine?

A I believe it was in the morning but I am not exactly sure.

Q This was the Gobbler-16, is that correct?

A Right.

Q Did you also test the machine?

A Yes.

Q What did you do with respect to testing it?

A With the foreman or building manager or supervisor, we permitted garbage to enter. There was a door where you could stop the flow of garbage at the very top of

this and then you could pull it back and the garbage could come down. But we had the door so garbage would enter the machine. We let it build up and it went through its normal paces, it had a bag on, and it filled the bag and operated normally.

Q You say you utilized garbage to put it through its paces, so to speak?

A Yes, garbage that came down from the chute.

Q In other words, from the apartments upstairs?

A Yes.

Q Did this machine have a hopper door?

A Yes.

Q And did you have occasion to open the hopper door?

A Yes.

Q Was it operating at the time you opened the hopper door?

A Yes.

Q At that time when you opened the hopper door, did the machine cease or stop?

A No.

Q So that would it be correct to say that there was no interlock system on the hopper door?

A No interlock system. There was a locking device

that you could put -- there was a latching device, two latches, that you could put up and lock it, and then there was a hole through the latch if you wanted to lock it but no interlock system per se.

Q When you are talking about the latching devices, I show you Plaintiff's Exhibit 1. Are you talking about the latching devices up on top of the hopper door that is exhibited on that picture?

A Yes, on top and then the two extensions hanging down here on the door itself.

Q In other words, that would be the latch which would go onto the I hook, correct?

A Yes, right.

Q With respect to that type of hook, if it were desired, for example, could a padlock type lock be placed upon it?

A Yes, if you wanted to you could, right.

Q Mr. Deutsch, we have already gone into the various nomenclatures and so forth of the machine here. Would you tell us, please, with respect to your testing, did you take any measurements, any timing, of what went on when the garbage came down and activated the machine?

A Yes.

Q First of all, was there something which activated

the machine?

A Yes.

Q What is that?

A An electric eye.

Q Can you tell us, please, how did that operate?

A It operates when the hopper or storage compartment just above the ram fills up, there's -- this is a hopper -- there's a light on one side and a receiver of the light, an eye, if you wish, on the other side. When the garbage comes down, it breaks that light, contact, telling the machine that there is garbage in it and it has to operate. When that breaks the light, then the ram is in what we call the extended position, that is, it is all the way forward as if it had already pushed garbage into the compactor section or extrusion section, if you wish. What happens then is when the light is broken the ram retracts at a very slow rate and the garbage then falls into the void left by the ram, in other words, the compactor section, if you wish. And then, upon doing that -- there is a five second delay, by the way. When you break the light it takes about five seconds. It has to break it for five seconds. So if you put your hand in there it doesn't operate immediately. It takes a whole five seconds for that to operate.

Now, it retracts, the garbage falls in and then

very slowly the ram pushes the garbage forward into the extrusion section of the compactor or extruder or filler, whatever you want to call the machine.

Q When it is pushed into the extruding section, what happens to the garbage then?

A It gets pushed into a cylindrical plastic container or bags through a tube -- I call it an extrusion tube -- and then there is a switch device at the end of this thing which tells it that it is empty and will stop the machine if there is no plastic bag.

Q Let's assume for the moment that a large object comes down and let's assume for the moment that it goes into the compacting chamber and for some reason the ram cannot push it through the extrusion section. What happens then to the ram? Does it get stuck, is there any damage to the machine, what happens to it?

A No, there is no damage to the machine. What happens is -- to push the ram you have oil pressure. There is an oil pump which you have probably seen on garbage trucks and so on. There is a hydraulic cylinder behind that pushes the ram forward. When the machine is activated the oil pump starts to go and makes sort of a whining sound and pushes the ram forward with oil pressure. When it hits resistance, the pressure continues to build up until it gets

to 2400 pounds per square inch pressure or 2400 pounds of pressure. At that pressure there is a switching device which tells the ram "You are now at 2400 pounds. Reverse."

And what happens is when it reaches 2400, there is like a pressure control which reverses the ram and sends it back. Then it will continue to go back and forth. Let's assume this is the device. The purpose of this is, number one, very often if it gets something caught in at a strange angle if it goes back it will fall into place and then it can be pushed through or by going back and forth it will literally crush anything in due time either than maybe a thick cylindrical bar of steel but any wood object or paper object or porcelain object eventually by this continually going back and slight changing of direction it will eventually crush it. It will go all the way and stop again.

Q When you say go all the way, all the way to where?

A Extended position, closing off the compacting portion of the chamber and then it will stop.

Q Then assuming there is no more garbage coming down at that point it will come to a stop automatically?

A Yes, but if garbage is still coming down then the eye will still be broken, the light from the eye will still be broken, and then it will continue to run continuously

until the eye is open, the light is permitted to pass through.

Q All right. With respect to the garbage disposal itself, this is a sort of sausage-type, vinyl bag it has been described here attached to the front of the unit?

A Yes.

Q And the sausage extends out.

A Yes.

Q Now, once that sausage is filled up, so to speak, what happens to the unit?

A There is a switch at the end of this extension which, when it is -- well, actually there is a point where they can tie it off and make containers out of it. But if the bags are all gone and it is completely used up, the switch -- there is a sort of a wire switch, that will fall down because there is no more plastic there. That breaks it and shuts the unit off.

Q So that it can shut itself off automatically, is that correct?

A Yes.

Q In other words, Mr. Deutsch, and correct me if I am wrong, this is a machine, once it is turned on, will start automatically upon receipt of garbage, will stop automatically when there is no more garbage or will also stop if the bags are filled, is that correct?

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A Yes.

Q With respect to the control panel, in this machine the control panel as you are facing it, the control panel would be on the left side, is that correct?

A Yes, if you are facing the front of the machine, in other words, if you are standing where the bag is, the control panel is on the left.

Q Now, on the control panel we have already heard, Mr. Deutsch, that there was the on switch-off switch.

A Yes.

Q Did you locate that?

A Yes.

Q Is there also a reverse switch?

A Yes.

Q Assuming for the moment that something is stuck

A There is also, just to be complete, there is a wall switch which also turns it on, which is separate from the control panel of the machine.

Q Other than on the machine itself, you are saying there is a junction box, is that it?

A Yes.

Q Up on the wall?

A Yes.

Q And if that is shut off that completely prevents

juice or electricity from going into the machine?

A That's right.

Q With respect to the ram -- and, incidentally, this is Defendant's Exhibit B, is this the ram as you have described it to us? Is that the ram in its retracted or in its extended position?

A That's what we would call the retracted position.

Q When it is back, in other words, is that correct?

A Yes.

Q Supposing, for example, that the ram were forward but somehow was stuck in some piece of garbage. Is there a button on the machine which could force the ram into that retracted position that you see now?

A Yes.

Q And where is that button located?

A Right on -- well, I can give you the exact distance. That button is about three foot back from the front of the ram in its extended position.

Q If the operator were to press that button, the ram could go backwards, is that correct?

A That's right.

Q Then if he wants to keep that ram in that position, he either holds his hand on that button, is that correct?

A Yes.

Q Or he can turn the on-off switch to off, right?

A Right.

Q Then that will hold that ram in that retracted position?

A Yes.

Q Assuming then that there was some object causing some obstruction to the ram or somehow entangles in the ram, a person could then reach into the hopper door and grab that particular object, whatever it may be?

A Yes.

Q And when he reaches in and the switch is turned off, he cannot activate the machine, is that correct?

A That's right.

Q Mr. Deutsch, with respect to interlocks, would you describe that to us? What are interlocks, first of all?

A Interlocks are really just part of the electrical circuit generally or you can have a mechanical interlock which requires that you -- in this case anyway, that if you did something you would shut down the machine. You could have a hydraulic interlock, mechanical interlock, electrical interlock which would shut down the machine and prevent it from moving in the event you did something, A, whatever you wanted to do. In this case, if you wanted to open the door

and shut down the machine, you could provide a switch or you could provide an electric plug and plug it in so that you could remove -- you have to remove the plug to open the door or you could provide a hydraulic system, in other words, to the pump, for example, and then that would stop the flow of oil to the pump, whatever way you want. But it is a way of stopping something when you do something else.

Q I believe you have already told us that when you looked at this machine it had no such interlock system on the hopper door, is that correct?

A That's right.

Q Now, such interlock systems, Mr. Deutsch, can they be installed even after a machine has been manufactured?

A Yes.

Q Back in 1970, Mr. Deutsch, do you have an opinion as to whether or not the standards in the business required interlocks on a hopper door such as this particular compactor?

A No, they did not require interlocks.

Q With respect to the standards, Mr. Deutsch, under the Industrial code of the State of New York, does that provide general standards for the industry?

A Yes.

Q Did that in 1970 provide any requirement for int-

locks on this type of chute-fed compactor?

A No, the industry code 19 did not require interlocks.

Q When you told us just a moment ago that the standards back in 1970 did not require interlocks, what standards do you have reference to?

A I am talking specifically about industry code 19. I am also talking about U.L. 430, which is -- It is the same code but they have a different -- C33.59, American National Standard Institute Code. The ANSI, American National Standard Institute, is a body that takes all the codes, regardless of what it is, and they have a complete catalog of codes, and you can then go to them. It is not just their organization. They will have codes from the N.F.P.A., the American Mechanical Engineers, and they just compile them and then they give them their own number. So sometimes they use a U.L. code, which is Underwriter's Laboratories.

Q You have told us that the U.L. 430 which was then adopted by the American National Institute did not require interlocks?

A That's right.

Q With respect to your examination and testing of this particular machine, do you have an opinion, Mr. Deutsch, whether or not that met the safety standards?

A Yes, this was designed in accordance with good practice, it was well guarded and complied with all the guarding requirements of industrial code 19 and the U.L. code.

MR. SHANDELL: I move to strike the answer as not responsive, your Honor.

THE COURT: Overruled.

Q What do you mean by "guarding"? You used the word "guarding."

A The industry code 19 and the U.L. code requires that you have a protection device, a housing, on the unit to prevent accidental contact with the moving parts, so that you don't brush up against them or if you are walking by you don't hit into them or anything in the normal operation of the machine. The normal operation of this machine required that the doors be closed and that the -- there is no reason for anyone doing anything but operating -- and this goes to the operator -- there is nothing the operator has to do inside that machine. All his operations have to do with external parts, namely, the control panel and filling the oil. The instructions require the man to do only those things which are external to the compactor, hopper and compacting chamber. There is nothing that he has to do or is required to do. As a matter of fact, quite the contrary. He is told not to do anything inside that compaction chamber.

MR. SHANDELL: Objection. I move to strike the latter part of the answer.

THE COURT: I will sustain that subject, however, to your developing this. In other words, the point is -- one of the points I understand counsel to be objecting to is we don't know what we are talking about. So I am going to ask the jury to disregard this answer but this is without prejudice to you to develop it, if you can.

Q You were mentioning something about external operation. Where did you get such information as to whether an operator should operate this externally or internally?

A From the instruction manual of the Gobbler -- from the manufacturer.

Q You also mentioned that the instructions, I believe, do not require that a person manually operate the machine from within, is that correct?

A That's right, or even get within it in any way.

Q Let us assume that something has gone wrong inside, that there is some jam-up or something has happened. Let us assume that for the moment. What then would be the proper practice of the operator of such a machine?

A The machine is designed, as I mentioned before, on that reversing operation to reverse itself when it meets an immovable object, if you want to put it that way, and it is

designed to reverse and continue going back and forward and no harm will come. It can do this indefinitely, for years even, to go back and forth, the ram, and that's all you should do is let that reverse.

Now, if for any reason it did get jammed, it would do this automatically, but let's say for some reason it stayed in the extended position and was clogged by some piece that we don't know of, you can push the reverse button. Now, if that does not reverse the ram and, actually, it automatically is already done, so theoretically that should not reverse the ram unless the electrical contact is bad, then a serviceman should be called in. There is nothing that anybody should do at that point because the machine should take care of itself. It is an automatic -- fully automatic machine.

Q Incidentally, in pressing that reverse button, Mr. Deutsch, to make the ram go backwards, is there a certain sound that it makes when a ram then goes backwards?

A Well, there will be a clicking sound, but the motor pump is the same in the forward and in the back position, but you will hear sort -- the engagement will be different like when you switch the gears in your car you will hear a clicking noise of sorts.

MR. IVONE: That's all I have.

THE COURT: Mr. Kohler?

MR. KOHLER: No questions.

MR. ISAAC: One question, your Honor.

CROSS EXAMINATION

BY MR. ISAAC:

Q The machine, sir, as manufactured and delivered to a user or an owner of a building did not come equipped with any lock, is that correct?

A I don't know that. It came equipped with the latch which in effect locks it, I mean keeps it from opening.

Q I am talking about a lock of some kind which requires a key or a combination. As manufactured, it does not come equipped with an actual lock of any kind to lock that door, is that right?

A I never saw the purchase order and I honestly don't know that, whether it did or not.

Q I am not talking about a purchase order. You looked at the instructions, the manual?

A It may have come with a padlock of some sort. I don't know. That would be a matter of the purchase order.

Q Is it in the manual? That's all I want to know.

A No, I don't see it in the manual.

Q Is there anything in the manual which indicates that the machine as manufactured and shipped comes with any

kind of a lock other than the hasp you were talking about?

A Not to my knowledge.

Q Do you want to look at it to make sure, Mr. Deutsch?

A I know it is not mentioned there.

MR. ISAAC: Thank you. That's all I have.

THE COURT: When you mentioned the Gobber-16 book, were you referring to that orange and white thing you see down there on the table?

THE WITNESS: Yes. I have a photostatic copy of that.

THE COURT: Mr. Regan?

CROSS EXAMINATION

BY MR. REGAN:

Q These compactors were put in a few years ago when New York City banned incinerators, is that correct?

A Well, they didn't actually ban them. They upgraded them. You had a choice of either upgrading your incinerator with certain types of scrubbing devices and combustion control devices to reduce, you never prevented, but to reduce the pollution from incinerators or you could go to a compactor.

Q Did this compactor meet the requirements of the City of New York?

A Yes.

THE COURT: Mr. Wilensky?

MR. WILENSKY: I have no questions, your Honor. Thank you.

THE COURT: Mr. Shandell.

CROSS EXAMINATION

BY MR. SHANDELL:

Q Mr. Deutsch, following your examination of this machine at the request of Mr. Ivone's office, did you draw up a report to render to them about this machine?

A No, but I did discuss this -- I thought I had a letter here -- no, I discussed this extensively with Mr. Ivone and actually the initial man on this was a Mr. Fried.

Q You didn't give them a written report?

A No. There just wasn't enough time.

Q Mr. Deutsch, did you make some notes of your examination of this machine at the time?

A Yes.

Q May I see them, please?

A Yes (Handing).

MR. SHANDELL: May I have a few minutes, if your Honor please?

(Pause)

Q Excuse me, Mr. Deutsch. Do you have here your

memorandum of November 22, 1974?

A Isn't that in there? It should be in there.

Q Would you show it to me, please?

A I have here a memorandum of November 5th. It should be here. Probably in going over my notes I forgot to put this in.

Q You charged Mr. Ivone's office for writing that memorandum, didn't you?

A Yes.

Q How much did you charge them?

A Let's see. Well, review of New York City, New York State codes, building codes 19 --

Q Let's break down your bill that you have here, sir. You charged them for going there?

A Yes.

Q For reviewing the codes and for a memorandum of November 22, 1974, is that correct?

A Right.

Q I would take it that a memorandum would be a report, sir, wouldn't you?

A No, it wasn't a report. It was just --

Q What did you charge them for, for not reporting?

A It was two hours, if you look here, and the bulk of the two hours, it was merely a statement which I told

you I reviewed these codes and that was it.

MR. SHANDELL: Mr. Ivone, may I have a copy of the memorandum of November 22, 1974?

THE WITNESS: I might have it. I will look here. I threw other stuff in here.

(Pause)

MR. IVONE: Here it is.

(Handing)

Q May I see the rest of your file there?

A Yes.

(Handing)

Q Sir, could you read me everything you said about that machine as you stood there at the building examining it and making notes?

MR. IVONE: I will object to that.

THE COURT: Yes. I don't quite think that is an appropriate question. That could be all kinds of stream consciousness. You must have something more definable in mind than that.

Q Sir, is there anything in your notes that indicates what happens when the garbage comes down the chute that you made then when you were examining the machine?

MR. SHANDELL: May I approach the witness, if your Honor please?

THE COURT: Yes.

A It makes a high-pitched noise. This is background information.

Q I want to know what you wrote about that machine when you were there examining it.

A It says here -- these are just word notes. Reverse, then has sound, makes high-pitched sound when on, can -- this is a question -- can machine be off with machine in full open. We answered that before. The answer is yes. Thirty seconds to open and back. In other words, the full cycle is thirty seconds to open and return. It says machine turned off during night. This was something that -- we had the foreman and we had quite a few people, we had five or six people, some people from the building, operators and so on. Then I have a serial number, model 16, serial number 84A0232L, three horsepower, volts 208-230, 460, three phase and then I have a list of patent numbers here, and then a timing, out twenty seconds, in ten seconds, eleven seconds. I timed it a few times. It is manufactured by Auto Pak Company, 4908 Lawrence Street, Bladensburg, Maryland, 20710. Then I have a sketch here of the machine.

Q With dimensions?

A With some dimensions, right.

Q Is there anything in any of your notes that indicates what happens while garbage was coming down in the machine?

A I think I have already mentioned what happens.

Q Is there anything in your notes, sir?

A No.

Q Isn't it a fact, sir, that as you were standing there Mr. Herman, the superintendent, was there?

A I don't know names.

Q Somebody from the building was there?

A Yes, somebody from the building was there.

Q Lawyers were there?

A Lawyers were there, right.

Q Isn't it a fact that you opened up the hopper door to watch the machine work, is that right?

A Yes.

Q Isn't it a fact as you stood there two things happened, garbage blocked up and Mr. Herman had to put a stick in there to break it up?

A No, sir.

Q Isn't it true something hit and bounced up at you?

A No, sir.

Q It didn't happen?

A No, sir, not once.

Q Now, sir, you were sitting here when Mr. Aaronson was testifying?

A Yes.

Q While Mr. Aaronson was testifying, Mr. Ivone asked Mr. Aaronson about some Quossoin equation, lateral force. Do you remember that?

A Yes.

Q What is the name of that?

A Quossoins.

Q What is that?

A It says that if I have a bag of garbage here, since we are talking about garbage, and I push down on it, that it will not only be compressed, the sides will move out. That's all. That happens in steel and it happens in wood or any compression member. So that's the ratio of how much it moves out to how much it moves down.

Q That will create lateral forces?

A That's right.

Q And in a situation like that, if you stacked it up, garbage, like garbage bags, lateral forces would tend to jab these things against the side walls of the machine, is that right?

A Not until it stopped. You have to have compression.

Q But if there is weight up above it, if there is a pileup of stuff, it would tend to create lateral forces that would tend to push these bags out against the side of the machine, is that correct?

A It has to be compressed first.

Q If there is a big stackup of stuff it gets compressed, right?

A Stackup from where?

Q From up above.

A You mean if it is stuck up above?

Q Yes, a pile --

MR. IVONE: How far up above? Can we break that down now?

Q If there is a pileup of material, you say lateral forces down at the bottom of the pile in addition to squashing the material down would squash it to the side, is that correct?

A If you had two or three stories of it.

Q Depending on the weight there would be that much force, is that right?

A That's exactly it.

Q Less weight less force, more weight more force, that's your ratio?

A It has to be compressed.

Q That is your ratio, the more weight, the more lateral force, the less weight, the less lateral forces, right?

A Right.

Q Now, sir, we were talking about standards and you told Mr. Ivone about two standards, one the ANSI standard and one a Department of Labor standard?

A Yes.

Q Let's deal first with the Department of Labor standard. Is there anything in the Department of Labor standard that says you don't have to have interlocks on the hopper doors of compactors?

A It does not require. It only tells you what you have to have.

Q It doesn't say anything about compactors at all, does it?

A That's right.

Q It doesn't deal with the subject?

A It deals with guarding machinery.

Q Excuse me?

A Guarding machinery.

Q As to guarding machinery it provides for any number of safety devices, is that right?

A Mostly guards.

Q Aren't there guarding devices when you have moving machinery the operator has to push two buttons with two hands so he doesn't get his hands caught in the machine?

MR. IVONE: Objection.

THE COURT: Sustained.

Q Mr. Deutsch, isn't it a fact that in the New York State Industrial Code other forms of grinding and chopping machines are required to have interlocks on the doors, are they not?

MR. IVONE: Objection.

THE COURT: Sustained. We are dealing, as I thought we all agreed long ago, not today but in 1970.

Q In 1970, sir, the industrial code required interlocks on the doors of other kinds of grinding and chopping machines, isn't that correct?

MR. IVONE: Objection, your Honor.

THE COURT: Sustained.

Q Indeed, there was no section in 1970 that applied to compactors, is that right?

A That's right.

Q Now, sir, when did you examine this machine?

A 1974.

Q When you examined that machine, did you find that it to be -- I think you told Mr. Ivone, you said it was a safe

machine, that it complied with all codes and standards?

A Yes.

Q Did you not say that in 1970 it complied and then along came something and maybe it didn't comply later, you are saying it is as safe today as it was then, is that what you are saying?

MR. IVONE: Objection, your Honor. My question to him has always been in 1970.

THE COURT: I agree.

MR. SHANDELL: I must respectfully disagree. I heard the answer. His answer was it was safe when he examined it.

THE COURT: Just a moment, please, Mr. Shandell. Your role does not call upon you to be saying things like that. The objection is sustained. There are several grounds on which I made the ruling. Among others, it is that your question was bifurcated, part of which I am sure you did not want to ask, in any event. You rephrase it. You let me play my role and you play yours.

MR. SHANDELL: Sure.

Q Are you saying that in 1970 this machine complied and something happened after that or are you saying that principles of engineering being principles of engineering, this machine was a safe machine when you examined it and it

was a safe machine in 1970?

MR. IVONE: Objection.

THE COURT: There are two questions there, Mr. Shandell. One at a time, please.

Q Sir, are you saying that this machine met standards in 1970 and things have changed since?

MR. IVONE: Objection.

THE COURT: Again, Mr. Shandell, please, one question at a time.

Q Are you saying that this machine met the standards in 1970?

A Yes.

Q Are you talking about any particular standard that ever dealt with compactors specifically?

A No.

Q So what you are saying is that nobody ever outlawed before 1970 a compactor that didn't have a hopper in it, is that what you are saying -- an interlock?

A I am saying that in 1970 you didn't require an interlock.

Q There was nobody who outlawed a machine such as this without an interlock, is that right?

MR. IVONE: Objection, your Honor.

THE COURT: Sustained. We have already got an

answer to that several times. There is no need to repeat it.

Q When you say it didn't require it, you meant no law required it?

A The industrial code rule 19 did not require an interlock and U.L. 430, which is C33-- the ANSI code, whatever the number is, didn't require it either.

Q Do you engineers design your machines by looking at codes or design them according to good engineering principles?

A Both.

Q So a machine might not meet good engineering principles even though you couldn't point to anything in any code that said that some part of that machine was bad, isn't that correct?

MR. IVONE: Objection, your Honor.

THE COURT: No, I will allow that. If you understand the question.

THE WITNESS: No, I really don't understand it.

THE COURT: Rephrase it, please.

MR. SHANDELL: Yes, I will.

Q When you as an engineer design a machine, do you first go to look at the code to see what's illegal?

A You certainly -- if you are designing a machine,

you should know the code or you shouldn't be designing a machine.

Q Sir, would you in designing a machine be concerned only with what was legal under the codes?

MR. IVONE: Objection, your Honor.

THE COURT: No, I will allow that if you understand it, Mr. Deutsch.

A The code provides certain safety requirements. I don't understand that it doesn't tell you what diameter you should make the ram or what pressure you need in the pump or what steel to use or any of the details. So as to the details certainly you have to rely upon your education as a mechanical engineer, a chemical engineer, whatever you are designing, sure, but the code sets certain things that either you should do or should not do and you should comply with those dos and don'ts.

Q In 1970 if one went to design a compactor could one find a code about compactors, a safety code for compactors?

A I don't know of any.

Q You don't know of any?

A No, specifically.

Q So in 1970 if one were to try to design a safe compactor there isn't any code one could turn to?

A Yes, there are many codes you could turn to.

Q One would have to turn to general principles, is that correct?

A One would have to turn to codes, and one of them would be guarding of dangerous machinery, vats and pans, and look in that.

Q There was no code that applied specifically to compactors?

A That's right. You would have to evaluate, if you were doing your job, you would look it up and look up the various codes to see if there was anything. Then if you see something about guarding of machinery you would want to know what does that mean, and am I guarding this machine. Now, this says that I shall guard it, and this machine was in fact guarded. Guarding is simply putting it in a closure and this was put in a closure.

Q So if one were to look at industrial code -- what number is that?

A 19.

Q -- 19 one couldn't find anything that specifically said compactors, is that right?

A That's right, to the best of my knowledge.

Q But one might, I think you said, find analgous kinds of machines described there to which one could look for principles?

MR. IVONE: Objection, Your Honor.

THE COURT: It has already been asked and answered about thrice, so I will sustain the objection to that.

Q In looking through code 19, one comes, for instance, to a section that deals with guarding plastic scrap grinders, is that correct?

MR. IVONE: I object if he is going to deal with other machines.

THE COURT: I think that the code does deal with it but I don't see the relevance, Mr. Shandell.

MR. SHANDELL: If your Honor please, may I argue to that point?

THE COURT: No. I said I don't see the relevance. Let's go on to something else.

Q Mr. Deutsch, when you went to look at that code to see if that machine should have an interlock, did you look just for compactors in that code?

A I looked under guarding of machinery and in this case this is a slow-moving ram -- I want to say also that I looked up rulings by the Board of Appeals and on slow-moving rams no guarding is even necessary. They have actually ruled, and I have the case right here, which states that you don't even need a guard, but they have exceeded -- that is, the Gobbler people have exceeded the requirements and have,

In fact put a guard in conformance with good engineering practice.

MR. CHANDELL: I move to strike the answer as not responsive, if your Honor please.

THE COURT: The last sentence I would agree with you and I will strike it and ask the jury to disregard it.

Next question.

Q Sir, under guarding of dangerous machinery in code 19, are there not requirements for interlocks on various of those machines?

MR. IVONE: Objection, your Honor. We are going again into different types of machines.

THE COURT: I will allow a question as to whether or not there is any portion of section 19 that existed in 1970 dealing with interlocks for any machinery.

MR. IVONE: Regardless of whether it applies to this machine or not.

THE COURT: I said any machinery. Yes or no, period, is there anything in section 19, Mr. Deutsch?

THE WITNESS: Yes, any machine, yes.

Q And in code 19 there is no section, then, in 1970, specifically about a compactor either one way or the other, is that right?

A That's right.

Q Now, do you say to this Court and jury that a compactor such as this does not require for the interest of safety an interlock on the hopper door?

A I categorically state that this machine does not require an interlock.

Q Because safety doesn't require that, is that what you are saying?

A That's right.

Q Are you familiar, sir, with the National Sanitation Foundation standard number 13 for refuse compactors and compactors systems?

A I have seen it. I don't know all the details of it.

MR. IVONE: May I look at that before it is shown to the witness?

THE COURT: It is not being shown to the jury.

MR. IVONE: I made a mistake. I said "shown to the witness." All I wanted to do is look at the publication date and so forth.

THE COURT: Please. Let the examiner work. You will see it in due course. I will personally see to it that you see it.

Q Would you take a look at section 5, paragraph 5.1, [illegible]

A This is March, 1973.

MR. IVONE: There is no question.

A Now what was that?

Q Does not that --

MR.IVONE: Objection, your Honor.

THE COURT: Gentlemen, please. Mr. Ivone, first of all you want to see section 5.1 that Mr. Shandell asked Mr. Deutsch to read?

MR. IVONE: I would like to look at it.

THE COURT: Now is the time. Come up.

(Pause)

MR. IVONE: Will counsel for plaintiff concede he is showing something that is 1973?

MR.SHANDELL: Yes.

MR. IVONE: Your Honor, I thought we understood we are talking about certain standards in 1970.

THE COURT: Just a moment, Mr.Ivone. There is no question pending. I don't know what Mr. Shandell is going to ask him. As soon as he asks him something, believe me, you can then object and I will rule.

All right.

Q In telling us earlier --

A Can I read it?

Q Surely. In telling us earlier, Mr. Deutsch --

A May I read it?

THE COURT: He wants to read it, Mr. Shandell, please.

(Pause)

A Okay.

Q You were telling us earlier, Mr. Deutsch, that when you examined this machine as you examined it in 1974, it did not require an interlock on that door for safety. Did you have in mind paragraph 5.1 of the National Safety Foundation standards for safety?

MR. IVONE: Objection.

A This does not require --

THE COURT: Hold it. Mr. Ivone wants to object strenuously here.

Have you completed your question?

MR. SHANDELL: Yes.

THE COURT: You wish to object?

MR. IVONE: Your Honor --

THE COURT: I just want to know, do you object?

MR. IVONE: I am being put in a position, your Honor, where a jury is being asked to infer certain things almost surreptitiously by his constant questions.

THE COURT: Please, Mr. Ivone. The jury understands full well the judge will rule on objections. This is a standard, unexceptional practice in our profession of which

they know about. I don't want any argument from you on that. I simply wish to know, now that we have heard the question, do you object?

MR. IVONE: Yes.

THE COURT: May I now see this document you are looking at, Mr. Deutsch?

THE WITNESS: Yes, sir.

(Handing)

THE COURT: My ruling is as follows. First of all, I will allow the witness to answer the question which I understand simply to be really whether or not Mr. Deutsch was ever aware of this organization, something called the National Sanitation Foundation, that it had such a statement or rule or proposal.

However, gentlemen, as you must know, I am going to instruct the jury that whatever standards may have been promulgated in the industry or by ordinance or statute after 1970 has no application here.

On that basis, were you aware of that 5.1 of the National Sanitation people?

THE WITNESS: Not directly. I knew that there was no code requiring interlocks, and this also states that interlocks are not required.

Would you read it, please?

A I sure will.

THE COURT: Just a moment.

Did you hear that question, Mr. Ivone?

MR. IVONE: I heard it, your Honor, but it's gotten to the point where I don't know how I can possibly object. It almost sounds ridiculous, my objection, at this point.

THE COURT: Mr. Ivone, traditionally for at least eight centuries lawyers have been free to object. I don't know why today you suddenly think you can't. You may not like my rulings but you have a right to object. That is why I interrupted. I would suggest rather than sulk about it you object.

MR. IVONE: I am not sulking about it. In the eight centuries lawyers have been doing what they have been doing, in the ten years I have been practicing, I do not make useless objections.

THE COURT: You certainly have the right to object.

MR. IVONE: I am not. No more. Go ahead and read it.

A This is section 5. I will read the entire section.

"Performance and Safety. General: The safety

"requirements set forth herein are considered to be minimal and in no way are intended to encompass all requirements of the occupational Health and Safety Administration or other regulatory agencies."

Then in 5.1 under "Operational Safety."

"Compactors shall be so designed and constructed as to protect against inadvertent entrapment of an individual or his extremities in any moving mechanism. The refuse compacting zone shall be totally closed with an interlocking door, panel or closure or shall be otherwise adequately protected against entrapment of the person's extremities."

There is no requirement. In other words, you are given the choice of you can put that on but you can have, as it says, or shall be otherwise protected against entrapment of person's extremities. It gives you as the engineer a choice to use good practice. If you close the machine in and you have the door on it, that protects it from the inadvertent -- in other words, what they mean, if you are near the machine so you can't turn around and get your hand caught in it and you certainly cannot do that in this machine.

Q If the door was adequately protected, why would they use the phrase "interlocking door," sir?

A If there is no other way of doing it, they give you that choice. In other words, you as an engineer have a

choice of things. Generally the codes do not try to bind engineers in too tightly or you will end up with machines that really don't work. We have had this illustrated in our automobiles where you had the buzzer and then they rescinded the buzzer and so on. So they try to give the engineer as much flexibility as possible, and in this case they complied with that. They said, "Yes, if you have -- you can either put in an interlocking door."

That would be the case, let's say, in a household type thing where a housewife might put her hand in. You might want some sort of interlocking mechanism. But on a commercial unit which is completely automatic, done by professionals, which is high up and extremely difficult to get to, then there is no need for an interlocking door, especially when you have two hasps there and you have a hole for putting a lock on and then you have instructions which tell you that the operator, that is, the man who operates it, is only to do what he is told in the instruction manual. The instruction manual specifically outlines what he is supposed to do, nothing more.

C Thank you.

A Then they say, if there is anything else, call the serviceman.

Q Now, sir, one of the things that a manufacturer

of a product with moving parts would be required by good engineering practice to do in the interests of safety is to provide instructions for the use of the machine in some form of manual or other, is that correct?

A Yes. Not always. Some machines are better formed. I have clients and one is specifically a garbage compactor on a truck, and they have found that with their people who are operating the machine that in lieu of an operating manual they have a three-day training course. They find that manuals don't work. So what they do is have a training course with the men and they do that. So the company has an option. Either it can supply a manual. It can do both. Sometimes they supply an hour or two, send a man down, and instruct them on how to operate it. They do both. Then they leave open a phone number, saying, "If you get into trouble, call our serviceman and he will come right over."

Q You did tell us in reviewing this case one of the things that you took into account in deciding what safety precautions were needed was the fact that there were instructions that this was a completely automatic machine and the operator should not enter into the part where the moving parts are?

A Very categorically, yes.

Q Would you please read those instructions, sir?

A The entire instruction?

Q No. Read the part which says it is a completely automatic machine, the operator should keep himself out of the part where the moving parts are.

A Right. This manual -- foreword.

"This manual provides" -- can I possibly get some water, please?

THE COURT: Yes. We will take a recess at this point and you will be furnished with some water. We will take the morning recess at this point, ladies and gentlemen, about ten minutes.

(Recess)

(Jury present)

THE COURT: Now, Mr. Shandell, do you have any more questions?

MR. SHANDELL: Yes. There is a question pending, I believe.

THE COURT: We will have it read back to make sure.

(Question read)

A This, first of all, it is called the "Gobbler Model 15 and 20 Service Manual."

Page 1 is simply a table of contents and the

specifications on the material.

Q Sir, will you read the part where it says, "Keep your hands out of the machine"?

A Yes, I will. And automatic.

"This manual provides the Gobbler" -- this is foreword.

"This manual provides a Gobbler user with a description of the operating principles and the recommended installation procedure.

"Further, to afford the operator with insight into the internal workings of the machine complete instructions for properly operating and maintaining the unit are presented along with pertinent electrical and hydraulic drawings and schematics.

"Finally, since a number of machine components can be readily replaced by the user or by normal repairs made, a parts list and troubleshooting guide are included. Auto Pak Company engineers are available to provide further assistance to the customer when needed."

Then under "General Description" on page 5.

"Gobbler is a unique system of trash compaction. It is specifically designed for use when large volumes of refuse must be compactly and automatically stored for later removal from the premises. Refuse is deposited by the

"Gobbler into paper bags, metal cans or plastic containers. The Gobbler is a stationary compactor (Fig. 1), a large hopper on top of the compactor receives the incoming trash. This hopper is a large hydraulically operated horizontal ram. Several inches above the ram a light beam passes horizontally across the unit into an externally positioned photocell. The packing operation is completely automatic and is initiated as soon as enough trash accumulates to block the light beam for five seconds. The ram actuating mechanism begins its cycle retracking the ram. Trash then falls from the hopper into the space ahead of the ram and is forced out into a chamber where it is compacted. It is then extruded through a sizing tube and gradually transferred into a bag or can. If all the trash is forced out in this cycle, the light beam will no longer be blocked and the ram will stop in the extended position. If, however, more trash remains to block the light beam for another five seconds, the cycle will be repeated. The cycle will continue as long as the light beam is blocked for a continuous five second interval. When the container is filled to the required degree as predetermined by the setting of the snout switch (L.S.3), it opens a circuit which will shut off the unit and a red indicator lamp on the control panel is lighted. An empty disposal container must then be substituted for the full one, at which

time the machine is ready to run again."

Page 7 is installation, showing how to install and how to start it.

Paragraph E.

"When the ram is cycling, press the reverse switch and listen for the ram to stop, turn the on/off switch to the off and then release the reverse switch. The ram is now in retracted position. Recheck the hydraulic drive dip stick for full oil level indication, add hydraulic oil if necessary, see Section 4-C."

Page 8 is a sketch of the unit showing dimensions. Page 9 is a Figure 3 square D motor starter box.

Page 10 is operation. I will read one paragraph. If you want me to read it all, I will.

"To place the Gobbler in operation, first insure that proper electrical power is supplied to the motor starter box, turn the on/off switch on the control panel to on. The machine will now operate automatically until the disposal container becomes full. When the container drops off of the snout, a red indicator lamp marked 'full' is lighted on the control panel."

Then it goes into drawings and specific details.

This is paragraph K.

"When the hydraulic system pressure reaches 2400

"psi" -- that is pounds per square inch -- "due to back pressure exerted on the ram, the pressure switch (Fig. 8) will activate, energizing the ML-1 relay coil, reversing the blade travel."

Page 12 is another sketch. Page 13 is electrical unit, identification of electrical units.

Page 12 is location of basic units (Fig. 4).

Page 14 is electrical schematic (Fig. 6).

Page 15 is a hydraulic schematic (Fig. 7).

Page 16 is a hydraulic power unit. It is what we call an exploded diagram showing the parts as they are separated.

I jump from page 16 to 24. So I don't know what happened to the interim pages.

"General. It may be necessary to hose down the hopper, the ram cycling area and the machine exterior with hot water as required."

"Hydraulic System." This is paragraph C on page 24.

"The Gobbler hydraulic system is self-lubricating and normally needs no servicing. Maintenance consists of checking the dip stick for the hydraulic reservoir oil level with the ram in the fully retracted position and replenishing it if necessary with Citco Pacemaker No. 38 oil", et cetera.

Paragraph D on page 24.

"Annual servicing guide. One. Drain, inspect and clean the hydraulic oil reservoir (Fig. 8). Inspect the duplex pump assembly (Fig. 9).

"Three. Clean or replace the pump suction filler (Fig. 8).

"Four. Fill with new hydraulic oil to the proper dip stick level.

"Five. Go through the recommended start-up procedure, Section 2DND.

"Six. Recheck the dip stick for proper oil level with the ram fully retracted.

"Paragraph E.

"Recommendations. Normal service and maintenance procedures described above may be performed by building maintenance personnel. They should be thoroughly familiar with the contents of this manual. Appropriately experienced personnel may perform electrical and hydraulic service, adjustments and replacements of parts should trouble occur. However, the warranty is specifically and unconditionally void should disassembly of the following be attempted.

"One. The hydraulic power unit, (Fig. 8), which includes, a, electric motor; b, duplex pump; c, reversal valve; d, reversal valve solenoid; e, pressure switch; f,

"thermal overload switch.

"Two. Electric control panel.

"Three. Element switches.

"Four. Hydraulic cylinders and, five, photo-assembly."

Now, on page 26 you have a troubleshooting guide and underneath that there is a bracketed section which says:

"Asterisked items can be handled by building engineer."

Now I will read the asterisked items.

Under "Symptom" it says, "Unit keeps running," and the asterisked items are, "Dirty lens on photocell; remedy, clean lens. Dirty lens on photocell exciter lamp; remedy, clean lens.

"Photocell assembly out of alignment, align bulb."

All these, incidentally, can be done on the outside.

"Defective photocell exciter lamp; remedy, replace."

That's the only asterisked item.

Then under "Motor keeps running -- ram does not move or moves slowly in a jerky manner."

The one asterisked item is low hydraulic oil and the remedy is add oil.

Under "Motor keeps running, ram stuck fully extended," there are no asterisked items, so that the building engineer should not do that.

Under "Motor keeps running, ram stuck fully retracted" -- I am sorry. The first one was "fully extended" and the second one is "fully retracted." Again there are no items with asterisks.

Under "Unit stops running," under "Probable cause, motor starter box circuit breaker open. Remedy, press starter box reset button.

"Bag or can full. Remedy, replace.

"Blown control circuit fuse. Remedy, replace.

"Blown fuse in main line disconnect box. Remedy, replace."

No other asterisked items.

Under "Symptom, fuse keeps blowing." Asterisked item. "Improper control circuit refuse. Remedy, install proper fuse.

"Improper main line disconnect box fuses. Remedy, install proper fuses."

That's the only two.

Under "Unit not packing properly." There are no

asterisked items. In other words, he is not supposed to go into it.

That is it.

Q And that is where all of that says this is an automatic machine, keep your hands out of it, is that right?

A That's right.

Q Now, Mr. Deutsch, you have been telling us that, among other things, an interlock wasn't necessary in this case because it was a completely automatic machine and there was no need to go in toward the moving parts, is that right?

A That is part of it.

Q Now, in coming to this determination, were you ever advised that in use these compactors used to have blockages and bridging above the electric eye so that somebody would have to go in there and break up the blockages and bridging? Were you told that?

A No.

Q If this were a machine that developed blockages and bridging so that as it was used the customer found that he had to issue a stick to his employees to stick the stick in there and keep breaking up the blockages and bridges, then it wouldn't be an automatic machine that you didn't have to have any safety devices such as an interlock for, is that right?

A If the machine was run continuously, it was fair to say that under normal garbage sent down there would be no blockages or bridging.

Q I see. How did you learn of this?

A By watching the machine.

Q Excuse me?

A By watching the machine and by my experience with other compactors.

Q For how long a period did you watch this machine?

A I would say for approximately an hour, maybe an hour and a half, maybe two hours.

Q So that if the installer of this machine, the Universal Thermal Company, and its officer, Mr. Danziger, said this machine used to block and bridge even if the machine were left to run continuously, you would disagree?

A I would strongly disagree. As a matter of fact, I saw it when garbage came down. It worked very well.

Q If Mr. Herman said --

THE COURT: Let the witness finish.

A When garbage came down, the machine worked very well, and it came down only one or two bags at a time, filled the hopper and then when the light was broken it fell into -- the ram came back, the garbage fell in and there was no trouble whatsoever.

Q I want you to assume, Mr. Deutsch, that as the customer used this machine, as it was in operation, if a porter wasn't there to make sure the garbage would fall down to the electric eye, then the machine would not operate. Would you assume that, sir?

A Would you repeat it, please?

Q If a porter wasn't there to make sure the garbage would fall down to the electric eye, then the machine would not operate. Would you assume that, please?

A If a porter was not there?

Q If a porter was not there to make sure the garbage would fall down to the electric eye, then the machine would not operate.

A You mean the door was retracted so the garbage would not come down. There is a top door to stop the garbage. Is that what it is?

Q We will deal with that in a moment. Now I want you to deal with this. I want you to assume it has been testified at this trial by other witnesses if a porter wasn't present at the machine to make sure the garbage would fall down to the electric eye, then the machine would not operate. Would you assume that, please?

A I will assume it but I don't understand it. I don't understand how it couldn't fall down.

Q If it is bridged across the gap above the electric eye, then it could not fall down, could it?

A If that is open and someone throws garbage -- if you can get garbage through the door that they provide on the floors, that is much smaller than the diameter of the chute. So if anything that you can pass through that chute will go through the opening at each floor, it will fall down the chute.

Q Okay. And when it gets down there it can sit down until more builds up and the electric eye goes on, can't it?

A Yes.

Q And then some more builds up after that?

A No. As soon as five seconds goes by, the ram retracts, and gets it out of the way.

Q If two or three bags fall down at once it can bridge?

A There is more capacity. You can put ten bags without any problem.

Q I want you to assume this is what the building management found when they ran that machine.

A You mean after they didn't operate it at night?

Q No, that the reason they stopped operating it at night they found out if a porter wasn't there to make sur

the garbage came down to the electric eye the machine wouldn't operate. Assume that.

Then under those circumstances would some safety device be required to protect the porter's hands?

A I would say that under those circumstances you should get your money back on the machine.

Q Now, sir, you told Mr. Ivone about some other standards in addition to the Department of Labor standards which you consulted.

A Yes.

Q It was the Underwriter's Laboratories standard.

A Yes.

Q Which later became some ANSI standard?

A Yes.

Q Do you have that standard in front of you?

A Yes.

Q Would you turn to it, please?

(Witness hands document to Mr. Shandell.)

MR. SHANDELL: May I, your Honor?

THE COURT: Yes.

Q That standard doesn't say that interlocks are not required, does it?

A Yes, it says that interlocks -- on page eleven here -- it says the rotor -- "rotors of motors, pulley belts,

gears, et cetera shall be so closed or guarded as to adequately reduce the likelihood of injury to persons."

That was paragraph 13.

Paragraph 14 on page 11 says:

"With reference to the requirements in paragraph 13, the degree of protection required of the closure depends upon the general design and intended use of the disposer. Among the factors to be taken into consideration is judging the acceptability of exposed moving parts are: one, the degree of exposure; two, the sharpness of the moving parts; three, the likelihood of an accidental contact with the moving parts; four, the speed of movement of those parts; and five, the likelihood of fingers, arms or clothing being drawn into the moving parts such as at points where gears mesh, where bolts travel onto a pulley or where moving parts close in, pinch or shear action."

Q Would you read Section 102 there?

A All right. This comes on page 28 under "Special Safety Features General."

"If the normal operation of a disposer involves accident hazards, suitable protection shall be provided to reduce such hazards to an acceptable degree except as given in paragraph 106 through 110, the details of guards, safety releases, interlocks, et cetera not specified but the need

"for such accessories and their adequacy, if provided, are to be determined from a study of the complete disposer, its operating characteristics and the likelihood of accidents resulting from other than gross negligence."

Q Am I right, then, Mr. Deutsch, that the designer of a garbage disposer, a similar machine, would have to make a study of the likelihood of accidents arising out of the use of his machine and the availability of safety devices to help prevent such accidents and then decide what would be appropriate?

A I don't think that 102 is complete without 103.

Q Can you answer my question? I will let you read 103.

A Well, I think 102 answers the question, doesn't it, really?

Q Am I correct that what a designer should do under that section, in general engineering principles, is consider what the hazards are, consider what the available safety devices are and decide what would be appropriate to safeguard the operator of such a machine?

A Yes.

Q Is that what he basically has to do?

A That's right.

Q And if a designer was unaware of the existence

of such safety devices as interlocks, he would not be a very competent designer of machines with moving parts, would he?

A Unaware?

Q Unaware of interlocks existence.

A I think very few engineers are unaware of interlocks. I don't think he could have gotten through school. He would not be an engineer.

Q Let's assume he got through school. If he decides to design a machine with moving parts like that, should he in the exercise of good care familiarize himself with the availability of such safety devices such as interlocks before he goes and completes his design?

A I would say that's correct, right.

Can I read 103?

Q Certainly.

A This is in bold print.

"If a disposer has moving parts that are liable to cause injury to persons, a motor control switch other than a momentary contact switch on the disposer shall have a plainly marked 'off' position."

That is "shall."

In these codes when they want something they say you shall do it. That is something that is required and that

was provided here in this machine.

Q Would you point out the plainly marked "off" position on this machine, please?

A If you give me the top view. There is one with a top view. You haven't given me the wall switch.

Q I have all that are in evidence at the moment. I have all these. You can take a look at them. See if any of them gives you an appropriate view.

A I have seen a view showing the top of this control panel.

MR. IVONE: How about this?

Q Is this the view you are talking about?

A Yes. We will start with this one. Exhibit number 7. Do you want me to circle it or anything?

Q Show me the plainly marked "off" position.

A Do you have a pen or something?

Q I think the Court must have.

A This doesn't work on the photograph.

I have got it.

(Witness writes)

A On the control box there is an on/off lever, right just within a foot or a foot and a half, one-eighth inch, of the control panel on the machine, and that has an on/off you can see plainly marked on the cover of the box.

Q That is on the wall?

A On the wall.

Q How far is that from the operator?

A One-eighth inch from the control panel.

Q How far is it from the operator who stands in front of the hopper door?

A There is no reason to stand in front of the hopper door. What does he have to stand there for?

A To break up blockages.

A He doesn't have to break up blockages.

Q And that is the whole basis of your opinion, that the operator does not have to break up blockages, is that right?

A The question I have is are there "on/off" switches.

THE COURT: And that switch is on the panel, correct?

THE WITNESS: Right.

Right here you can see "on/off." There is the word "off."

Q Would you mark that where it is plainly marked "off"?

A Right there it say "off," and I will put it in brackets. Right there it says "off." To the left it says "on."

MR. IVONE: Is that marked in evidence?

MR. SHANDELL: I am sorry. It is not in evidence. Mark this into evidence.

MR. WILENSKY: No objection.

(Plaintiff's Exhibit 9 received in evidence.)

Q Now, sir, is it correct that the whole basis for your opinion is that a man didn't have to stand there at the open hopper door and break up blockages, is that right?

A No, it isn't the whole basis. It is part of the basis.

Q Now, sir, you talked before and you reached into the air and you grabbed something -- you talked before about a door to shut off the garbage.

A Oh, yes.

Q That is something you saw?

A Something I saw.

Q When you went there in November of 1974?

THE COURT: '74.

MR. SHANDELL: '74. Excuse me, your Honor.

Q Was that, the presence of that door to shut off the garbage coming down, part of the basis of your opinion about the safety of this machine?

A The original -- the equipment in 1970 was not exactly the same as what I saw. That portion had been changed.

But there was a fire door which could have operated manually to do the same thing?

Q Sir, when you saw the door in 1974, it had a big handle on it, you could shut it closed?

A Yes.

Q That wasn't in existence when this accident happened, is that correct?

A There was a similar door, a fire door, which closed automatically in the event that there was a fire so fire would not get up in the apartment and which could be operated and do the same thing that this. This exhibit, by the way, Exhibit 1, shows the present door that I saw.

Q Right. The door that was in existence at the time of this accident didn't have a handle like that on it?

A No one took a picture of the top that I recall.

Q We have them in evidence, sir. Did I show you the other pictures?

A No. I did inquire and found out you could operate it manually.

Q Here. That's the door that was identified as being in existence then. You don't see any handle on that door, do you?

A This was moved. This picture wouldn't show you. You don't see the top of it. This was moved somehow. I don't

think it was in that position.

Q You weren't there at the time the door was in existence, were you?

A I saw other photographs that don't show it. This has been turned around.

Q You saw other photographs that show another look at that door?

A Yes.

Q Where did you see those photographs?

A I saw one -- I have seen photographs showing that top in straight and not in the position here, and there was no view actually looking down at the top. What is this? I am not sure whether this is a handle or not up here. There is something here that looks like a handle.

Q You have no way of knowing how that other door worked in any way, you didn't examine it, is that right?

A I see here what looks like a U-shaped handle. I am not sure whether that is or not. What is that?

THE COURT: What exhibit are we looking at?

MR. SHANDELL: Figure 2 from Exhibit 7, your Honor.

A There is a U-shaped handle.

Q You say that is a handle?

A I am not sure.

Q Would you mark that?

A I am not sure what this is (writing). I put a question mark there.

Q After examining this machine, you wrote the next day and asked for Auto Pak to furnish you with any voluntary standards on compactors, did you?

A Yes.

Q So that you might look at them to see to what extent there was a compliance with standards or not?

A It is possible sometimes when doing an investigation of this type that sometimes new standards come out, you know, you can't stay on top of everything, and it is good practice, just as your doctor does, if you are not sure you ask somebody who is in the business and say, "Hey, are there any standards that I don't know about?" That's what I did.

Q So you assumed that the people in the business would know about any standards that you didn't know about?

A That might be the case and I wanted to be sure I didn't overlook anything.

Q Did anybody send you any standards?

A No.

Q Not even the National Sanitation Foundation standards, is that right?

A That's right.

MR. SHANDELL: I have no further questions.

THE COURT: Do you have anything further, Mr. Ivone?

MR. IVONE: No, your Honor.

THE COURT: Thank you, Mr. Deutsch. You may be excused, sir.

(Witness excused)

MR. IVONE: May I have that letter that was taken from my files, the one just given to you by Mr. Shandell?

Thank you.

THE COURT: Now, Mr. Ivone, do you have another witness?

MR. IVONE: I don't have a witness, your Honor, but I do have certain items that I would like to read from a deposition, if I may.

I can avoid reading the deposition of Albert Shayne if it can be agreed that in substance it will perhaps neither add nor detract from this case and I will avoid reading it, your Honor. I am making the statement in public so if anyone will agree I will refrain from reading it. Otherwise I will read the entire deposition.

THE COURT: If it is your view it doesn't add or subtract, I don't know why you bother to read it. I don't understand what your point is.

MR. IVONE: Let me put it this way: will it be conceded that Mr. Shayne did testify at a deposition? It will not be so conceded.

MR. SHANDELL: Of course I will concede it.

MR.IVONE: I am not asking the Court to concede these things.

MR. SHANDELL: Of course I concede Mr. Shayne testified at a deposition in this case.

MR. IVONE: All I am trying to do is to avoid the reading of some 30 or 40 pages. Can it be agreed in sum and substance it will neither add anything --

MR. SHANDELL: Mr. Ivone, if you want me to stipulate to anything he said I would be glad to stipulate to anything he said but that is a hard thing to stipulate to.

THE COURT: Mr. Ivone, it is your decision. If you feel that way, you don't have to read it. I don't understand. I have never heard anything like this.

MR. IVONE: May I read for the moment from the deposition of Mr. Herman?

THE COURT: You are talking about the witness Mike Herman who appeared here?

MR. IVONE: Yes, your Honor.

THE COURT: As a live witness?

MR. IVONE: Yes, your Honor.

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Page 14, line 12.

"Q When Mr. Merced began to work for Southbridge, was he immediately assigned to do porter work?

"A I will say yes.

"Q When did Mr. Merced commence to take care of the compactor machine as far as you know?

"A First time, 1971."

Page 20, line 7.

"Q Felix Merced was first assigned to building number seven at what date?

"A Sometime in 1971."

Page 33, line 21.

"Q Mr. Herman, were any men employed by Southbridge, porters or otherwise, ever injured during the course of the use of the Gobbler-16 machine?"

Continued question.

"Q Prior to July 13, 1972? Let's confine ourselves to this particular machine."

The answer appears at line 11 on page 34.

"A I think Merced. He cut his hand a little in the bags, you know, because the glass goes through the plastic bag, you know, and he scratched his hand or something like this. I think he was the one."

Page 35, line 4.

"Q On any occasion since the building was constructed, were any employees of Southbridge ever injured by any part of the inside of these machines?

"A No.

"Q Were the porters instructed to turn the machine off before attempting to place their hands inside the machine?

"A Yes."

Now if I may read from Plaintiff's Exhibit --

MR. ISAAC: Your Honor, may I continue the examination before trial?

MR. SHANDELL: I would want to read from that examination also.

MR. ISAAC: Before we get to another exhibit.

THE COURT: First of all, Mr. Ivone, if there is an exhibit in evidence you can read that during your summation but not now. Second of all, if there is any more Herman deposition business, let's get that out of the way.

MR. IVONE: All right, I have no objection if you want to read something else, except it should be on their own cases.

THE COURT: I don't know of any such rule at all. We are dealing with a witness named Herman. He has been here in the flesh. Let's get what he had to say over with.

I disagree with you, if you don't mind.

MR. IVONE: All right, fine, I have no objection.

THE COURT: Whatever it is you want to read, read from the Herman deposition.

MR. ISAAC: For continuity's sake may I read the same question and answer that Mr. Ivone just read?

THE COURT: Yes.

MR. ISAAC: Page 35, line 7.

"Q Were the porters instructed to turn the machine off before attempting to place their hands inside the machine?

"A Yes."

By counsel representing my office at that time. "I'm not so sure that you have testimony that the porters were ever instructed to put their hands in the machine. I think the witness has testified just to the contrary.

"Q Mr. Herman, do you know of any occasion when porters before July 13, 1972, would have to put their hands inside the machine?

"Q Was any part of a porter's duty to put his hands inside the machine on any occasion?

"A No."

Thank you very much.

THE COURT: Does anybody else want to read from

the Herman deposition?

MR. SHANDELL: Yes, your Honor. May I have a moment?

(Pause)

THE COURT: While he is looking, Mr. Ivone, have you got any other witness or documentary exhibit which hasn't been put in evidence yet?

MR. IVONE: No. I just wish to read from one, as I indicated before.

THE COURT: I said --

MR. IVONE: That's all I have.

THE COURT: If the exhibit is in evidence already, I would prefer, as is generally done, that you refer to it during your closing argument. Do you understand me?

MR. IVONE: I heard you, your Honor, yes. I have understood you.

THE COURT: Is there anything else that is not already in evidence is what I am asking.

MR. IVONE: I do not have anything else.

THE COURT: Mr. Shandell, have you found the place?

MR. SHANDELL: I am trying to find what I want to read.

Page 54, line 12.

"Q On those occasions when you saw the porters using the sticks to clear the machine, would you describe how that was done, what they did?

"A They opened the door and they was pushing the garbage down to the piston and the barrel (indicating).

"MR. GOLDBERG: Indicating a downward motion with both hands.

"Q Would they hold on to the stick with both hands?

"A Yes.

"Q When they were doing this was the machine on or off?

"A It was on."

That is all.

THE COURT: Does that take care of it?

MR. SHANDELL: Yes, your Honor.

MR. IVONE: I have one other item, your Honor. Will counsel for plaintiff concede that they retained V. Mofopoulos of 40 Water Street, New York, New York, as an expert for the purpose of testifying concerning alleged defective design in the machine?

MR. SHANDELL: I cannot so concede. It is not so.

THE COURT: What else?

MR. IVONE: Then I must read from the interrogatories,

your Honor, if I may.

Your Honor, in answer to a request for interrogatories, the demand in substance requested the names of experts that the plaintiff intended to use and the substance of the testimony of the expert, and the answer appears on page 57 of plaintiff's response to the interrogatories and this is apparently signed by Herbert Katz, who is a member of the law firm representing the plaintiff.

Item 57. "Dr. V. Morfopoulos, 40 Water Street, New York, New York, expert. Substance: Defective design machine."

Will counsel concede that this appears in the interrogatories?

MR. SHANDELL: I concede it appears in the interrogatories. We never retained him. He was unavailable.

MR. IVONE: This is now a voluntary statement.

MR. SHANDELL: If you want me to put Mr. Katz on to take that under oath, I will have to. He was never retained. He never saw the machine, he never evaluated it, he never inspected it on our behalf. It never happened.

MR. IVONE: The defendant rests, your Honor.

THE COURT: Mr. Kohler, I take it you don't wish to supplement anything that has been put in by Auto Pak, is that correct?

MR. KOHLER: That's right, your Honor.

THE COURT: Mr. Isaac, do you have any details you want to put in in addition to whatever has been put in here already?

MR. ISAAC: I would like to make an appropriate application which I think is in order at this time.

THE COURT: I didn't ask you that, sir. I am asking you, do you wish to put in any evidence?

MR. ISAAC: I have a witness here that has been here.

THE COURT: That is what I want to know.

MR.ISAAC: The answer to that question is in the affirmative, Judge.

THE COURT: Mr.Regan, do you have any evidence you want to put in?

MR. REGAN: No, your Honor.

THE COURT: Mr. Wilensky?

MR. WILENSKY: No, your Honor.

THE COURT: Very good. Do you want to produce your witness, Mr. Isaac, so we can hear him?

MR. ISAAC: I would like to make some applications to the Court before that.

THE COURT: If you wish to make some applications, you come up here to the side bar with your fellow counsel.

(At the side bar)

THE COURT: What is your application?

MR. ISAAC: I wanted to engage in an appropriate motion to the Court.

THE COURT: I said what is your motion. I just asked you. What is it?

MR. ISAAC: My motion is, generally speaking, to dismiss the third party complaint as against my client. I thought I would be heard extensively on that.

THE COURT: You have just been heard. Decision reserved.

MR. ISAAC: You don't want argument on that point?

THE COURT: I don't. I said decision reserved.

MR. WILENSKY: May I make my motion now?

THE COURT: Why don't you wait?

MR. REGAN: May I reserve?

THE COURT: Yes, you may.

(In open court)

THE COURT: Now, Mr. Isaac, who is this witness Southbridge wishes to have appear?

S E C U N D O D I A Z, called as a witness by defendant Southbridge, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ISAAC:

Q Mr. Diaz, I am going to ask you, please, to do the very best you can to keep your voice loud, all right, so that all of these people can hear you.

A Yes, sir.

Q Are you also known as Manny Diaz in the building?

A Yes, sir. They call me like that because it is kind of hard to pronounce Secundo Diaz.

Q Mr. Diaz, I am going to ask you to speak a little louder than you just answered me because I can't hear you.

A All right. Yes, sir.

Q Do you work for Southbridge Towers, sir?

A Yes, I do.

Q How long have you been working for our building?

A This past November was four years.

Q You started there sometime in 1970 or so?

A '70.

Q When you started there, sir, sometime in 1970, what was your first job?

A I was a porter.

Q Approximately how long did you work as a porter?

A Approximately about three months.

Q And after that what type of work did you begin to do?

A I was a handyman.

Q Approximately how long did you work as a handyman at Southbridge?

A Until '72.

Q '72?

A '71. I am sorry.

Q 1971?

A Yes, sir.

Q And in 1971 did you have your position changed again?

A Yes, sir.

Q Did you get a promotion?

A Yes, I did.

Q In 1971 what were you promoted to?

A Assistant superintendent.

Q Do you recall the approximate time that you became assistant superintendent in 1971?

A November, I believe, the 2nd.

Q The exact date is not that important. November, 1971?

A Yes, sir.

Q What were your duties as assistant superintendent? That is, tell us generally what your duties and responsibilities in that position were.

A Make sure that -- well, I had the handymen and all the porters under me. I would supervise them on their work. In case they needed anything, they would report either to me or to my foreman -- that was Cris at the time -- and in case any problem, emergencies, they would come either to me or to Cris, and if I needed anything, I would go a little bit higher. I gave out all the work. I told the porters. If I was short here, I would pull him out and he would cover this building. In other words, I would tell them what to do.

Q You mentioned the name of somebody named Cris.

A Yes, sir.

Q Is that a gentleman we have heard in this trial so often by the name Sulliverez?

A Yes.

Q Was he a foreman at that time?

A Yes.

Q Was he under you?

A Yes, he was.

Q Is he now in Puerto Rico, as far as you know?

A As far as I know, yes, sir.

Q Now, there has been testimony in this case, Mr. Diaz -- I want to save a little time -- that Mr. Merced, the plaintiff in this case, was in Puerto Rico between approximately June or July, 1971, and December, 1971. You

became assistant superintendent you say in November of 1971, right?

A Yes.

Q Do you know Mr. Merced? That is the plaintiff sitting in the back here.

A Yes, I do.

Q When he came back from Puerto Rico and applied for his job at Southbridge Towers and he started work, he testified sometime in December of 1971, were you then the superintendent or assistant superintendent?

A Yes, I was.

Q Do you have a general recollection of Mr. Merced coming back to the job in December of 1971 or thereabouts?

A Yes. He went away. Look, I was the assistant superintendent. When I took the position he came back and he wanted a job back. So we took him back in and then at that time I gave him a building. In other words --

Q When you say "we," the jury doesn't know what you mean by "we."

A Between myself and Mike, the other supervisor.

Q Mike Herman?

A Mike Herman, correct.

Q Do you know who it was that hired him back in December of 1971?

A That was Mike.

Q Were you present during the conversation, if you remember?

A No, I don't remember, sir.

Q When he came back in December of 1971 -- withdrawn. You had said Luis was the previous assistant superintendent. Was that Luis Rivera?

A Yes, sir.

Q In December of 1971, was there a compactor in the building known as building number seven?

A Yes, there was.

Q A garbage compactor, correct?

A Yes, sir.

Q In November and December, 1971, were you generally familiar with that compactor, generally?

A Yes.

Q Did each of the buildings have one?

A Yes, sir.

Q Building number seven, sir, was that a high-rise building or a low-rise?

A Low-rise.

Q How many floors did that have?

A Seven floors.

Q Is the compactor that was there in 1971, in the

month of November and December, the same compactor still there at the present time?

A Yes, sir.

Q Now, sir, when Mr. Merced, the plaintiff in this case, came back to the building in December of 1971, what was he hired to do, that is, what was his job title?

A He was a porter.

Q Was he assigned to any building?

A Yes, he was.

Q What building was he assigned to?

A Building number seven.

Q And as his boss, were you familiar with his duties?

A Yes, sir.

Q And his function as a porter in building number seven?

A Yes, sir.

Q Would you tell the jury generally what he was employed to do by the building in December of 1971 when he returned from Puerto Rico?

A Yes, sir.

Q Please do.

A Eight o'clock he would take out the garbage from the compactor and he would clean it out, take out the garbage

to the street. Between eight and 9:30 he should be through with that. Make sure the chute itself is clean before he did his routine cleaning in the building, that is, either sweeping the lobby, make sure the laundry rooms are clean, checking the stairways for any light bulbs that are out, buffing the hallways. Then later on, about that time, he would go back to the compactor, see if there was any garbage in the compactor, and if there was, his duty was to remove it, pack it up in a sausage bag, put it to a side and then he would continue the rest of his cleaning details through the whole day.

Q Did you have any kind of a conversation or discussion or talk with Mr. Merced when he first came on the job again in December of 1971 about his duties in regard to the compactor?

A Well, yes, I did.

Q Did you give him any kind of procedure or instructions of the building at that time?

A Well, he --

Q First, did you, yes or no.

A Yes, I did.

Q Please tell the jury generally what your instructions were in December when you were the assistant superintendent.

A Well, I told him about the operation of the

machines, that this was his building and the hours between he had to take out the garbage. We had to have the garbage out in the street by a certain time. If he doesn't have it out by that time, the sanitation would just miss us and we would have to bring back the garbage and wait for the next truck which would be the other day. As to the operation of the machine, I told him make sure the power is always off, make sure you have the latch on the top always closed before you even open the door for the lid. You got the off switch, make sure it is off.

Q Talking about the switches, where were they located?

A Right on the machine itself. The main power was on the wall. Facing the machine it would be the left-hand side on the wall and facing the front of the machine would be right in front of you.

Q Did you show Mr. Merced -- withdrawn.

When you gave Mr. Merced these instructions, talking about the machine, where did this take place?

A In the compactor itself.

Q Was he right there at the compactor with you?

A Yes, he was.

Q Did you give him any kind of demonstration or show him how it operated when he first got the job?

A Yes, I did.

Q Was there any period of time that he worked that compactor with you present?

A No, sir.

Q How long did it take you to show him how to use that compactor, approximately?

A Fifteen minutes, twenty minutes.

Q Were you there at that time?

A Yes, I was.

Q Was the machine there?

A Yes, it was.

Q Was Mr. Merced there?

A Yes, he was.

Q Did he indicate to you whether he had any experience working on that compactor before he left for Puerto Rico?

A No, sir.

Q Do you speak Spanish, by the way?

A Yes, I do.

Q Obviously you speak English, too?

A Yes, sir.

Q You are testifying in English. Do you know whether Mr. Merced spoke Spanish?

A Yes, he did speak Spanish.

Q Do you know whether he spoke English at that time?

A Yes, he speaks English. It is broken English, but he understands.

Q Have you ever heard Mr. Merced have a conversation speaking in the English language?

A Yes, I have.

Q I want to talk to you a little bit about this compactor.

We have many pictures here, Mr. Diaz. Just let me show you Plaintiff's Exhibit number 1.

MR. ISAAC: May I approach the witness, with the Court's permission?

THE COURT: Yes.

Q Is this generally the compactor you have been discussing, talking about in your testimony thus far?

A Yes, sir.

Q Mr. Diaz, this compactor had some kind of a chute where the garbage would funnel through and then eventually get into the hopper where this ram would push it forward and out into these bags, right?

A Yes, sir.

Q I am going to direct your attention to the chute or the tunnel, if I can use that expression, where the garbage flowed.

If you look -- if I looked at the compactor while standing in front of it and the compactor was against the bar where the jury is sitting, where would the chute be in connection with that compactor, the front, the middle or towards the back of it?

A The back of it.

Q Did the back of the compactor touch the wall?

A Yes.

Q Was the chute in the back by that wall?

A Yes, sir.

Q The chute, sir, that led from the upper stories into the compactor itself, did it lead straight into that particular hopper or was it at an angle of some kind? Do you understand my question, first of all?

A Yes, sir.

Q Would you tell the jury whether or not the chute fed directly vertically into the hopper or whether there was some kind of an angle?

A There was an angle there.

Q Could you describe as best you can, Mr. Isaac, not the degree of angle but in your own way, would you explain to the jury how that chute generally looked if you were to look inside there in terms of how it fed the garbage into the machine?

A Well, as you open up the hopper door, if you would look inside you would see that the drum would be at least maybe five feet in, in depth, and that the drum itself would be practically in front of you. In other words, the garbage would have to sit back there and then slide down into the drum.

Q And when the garbage came into the area, into the hopper itself, did it come down straight or was it at an angle?

A At an angle. It would slide down.

Q And the chamber where this ram was located, this thing that moved with the teeth, did that have its own little compartment?

A Yes, it did.

Q Now, about how far would you say the chute area was leading into the hopper itself from the front?

A From the front?

Q Yes.

A I would say about five feet.

Q Was it eye level?

A At an angle.

Q At an angle. Was it higher, lower or level with the eye if a man was six feet tall?

A Repeat that again?

Q If you wanted totouch -- if a man is six feet tall and you wanted to look at the chute which was at an angle leading into the hopper, would it be eye level, would it be lower than eye level or higher than eye level?

A Higher than eye level.

Q Could you reach that with a three foot stick?

A No.

Q Standing on the outside on the floor, sir, the chute where the garbage comes in?

A Three foot stick?

Q Yes.

A I would say a little longer.

Q I am talking about building seven as it existed in 1972, up to July, 1972. I am not talking about any other building, right?

A Yes, sir.

Q Were you familiar with building seven generally?

A Yes.

Q Prior to July of 1972, were there times when there were blockages or jams in the garbage as it was coming down?

A Yes, there is.

Q Did the building do something or have some kind of procedure to take care of that situation?

A Yes.

Q I would like you to explain that to the members of the jury.

A The porter was issued a stick -- well, each building had a stick, anyway. He would shut the machine down, make sure the power was off, open up the hopper door and with the stick itself try to jam the garbage down.

Q You are using an upward and a slanty motion, correct?

A Yes.

Q Let me stop you right here. I show you Plaintiff's Exhibit 3 which was brought here pursuant to a subpoena. Is this the type of stick that was located in the compactor room back in July of 1972?

A Yes, sir.

Q If you took this stick, Mr. Diaz, could you put it into a hopper, that is, the door, and hold it as I am holding it now straight up and down and push up?

A No, you can't.

Q Why can't you?

A Because the hole to the chute would be further in. You got a trap door there. You would be hitting the trap door.

Q What would happen if you took a stick, let's

say one foot, and went up and down, what would you hit if you hit the top?

A Solid door. You wouldn't hit the hole. You wouldn't hit the garbage at all because it is on an angle.

Q And the garbage, if I understand, was coming through from a chute about five feet in, correct?

A Yes, sir.

Q Could this stick fit into the hopper on a straight vertical position as I am holding it now, straight up and down? Could you slide that in, a three foot stick like that?

A No, you can't.

Q In the event that you had these blockages, sir, as you have described, you have described the use of the stick in a more or less upward slanted direction, if that didn't work, what would the procedure, if any, of the building be?

A Shut the machine down. Either get in touch with me or with Cris at the time, and he would get in touch with me, and we would go -- we have cinder blocks.

Q What?

A Cinder blocks. And we would go to the second floor and one guy would be down by the machine at all times and myself and the porter would go upstairs and take the

cinder block into the chute and shove it down. That would force the garbage down into the compactor itself.

Q I take it, to save a little time, the cinder blocks were used as a weight?

A Yes, sir.

Q To force any blockage in the chute, is that correct?

A Yes, sir.

Q Or any blockage into the hopper, is that correct?

A Yes, sir.

Q Did you ever do that with Mr. Merced before July of 1972?

A I, myself, no.

Q Do you know whether Mr. Merced ever took any cinder blocks and used it?

A No.

MR. ISAAC: I will ask your Honor to bear with me a little bit.

(Pause)

MR. ISAAC: Are there any more pictures in evidence?

MR. SHANDELL: I have more pictures, but I don't know whether they are in evidence.

MR. ISAAC: May I look at them?

(Counsel confer)

MR.ISAAC: May it please the Court, may I ask the witness to draw something on that blackboard? I can't seem to obtain the use of photographs.

THE COURT: If you wish.

MR. ISAAC: I will do it any way the Court instructs me.

THE COURT: If you wish to have him draw something, you may do so.

MR. ISAAC: I do.

THE COURT: Mr. Diaz, would you come down here, please.

(Witness leaves witness stand)

Q Sir, there is some chalk over here. Will you please do the best you can and draw a general appearance of the compactor and the chute, where it was located, and generally the angle of that chute coming into the hopper of this compactor machine? Can you do that? Make it large because we will have to show it to the jury. I know you are not an artist. Do the best you can.

(Witness writes on blackboard)

A There is a double door here that comes out about so much (drawing).

Q Thank you very much. Would you basically describe what are these two lines?

A This is the side of the drum itself and inside the drum this is where the garbage comes down.

Q Put a G indicating garbage.

(Witness writes)

Q Where it comes down, make an arrow showing a downward motion.

(Witness writes)

Q This circle, is that the opening where the garbage will go through?

A Yes, sir.

Q And this slanted line, what does that represent?

A That represents a metal place where the garbage would hit on an angle and then fall into the pit itself.

Q These teeth marks, that is supposed to represent the ram or piston which pushes it out?

A Yes.

Q Is this a closed unit?

A It is a closed unit, right. The garbage would come down this way.

Q When you said before that the opening by the chute where the garbage came into the hopper was about five feet away, is that from the front of the machine from here?

A No.

Q From where?

A Let's say here, because over here that's where the door is.

Q The hopper door?

A The hopper door.

Q If you look through this hopper door, if you opened up the hopper door -- is this the hopper door?

A Yes, sir.

Q -- could you see into the chute area where the garbage would come down?

A Yes, if you stand here you would see this directly.

Q You would see this opening?

A Yes.

Q That's on a slant?

A Yes.

Q That's about five feet away?

A Yes, sir.

Q Three foot stick then would not reach that area to hit, right?

A You mean on a curve? I would say about a four foot stick, but you would have to hit the garbage right about here standing in front of the hopper door. Usually what they did, since they had a short stick --

Q Speak up.

A Some people would stand up on the drum. This is

the drum right here. They would have the hopper door open and would stand on the drum and then they would push in the three foot stick forcing the garbage down.

Q And if that didn't work, then they would follow the procedure with the cinder block?

A Yes.

Q Calling you, right?

A Yes.

Q Was that generally the way the building functioned insofar as that was concerned in November, 1971, up through July, 1972?

A Yes, sir.

MR. ISAAC: May I leave this here, Judge?

THE COURT: Yes.

MR. ISAAC: Take the stand, please.

(Witness resumed stand)

MR. ISAAC: Your Honor, I know that the Court has been recessing for lunch at five minutes to one on a daily basis. Would you like me to continue?

THE COURT: Have you any more questions?

MR. ISAAC: Yes.

THE COURT: How much longer?

MR. ISAAC: Fifteen, twenty minutes maybe. Maybe a little less.

THE COURT: We will break for luncheon, ladies and gentlemen, and resume at 2:15.

(Luncheon Recess)

AFTERNOON SESSION

2:15 p.m.

(Jury present)

S E C U N D O D I A Z, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. ISAAC:

Q By the way, Mr. Diaz, did you know the plaintiff, Mr. Merced, when you were a handyman? Did you know him back in those days?

A Yes, I did.

Q In addition to the original instructions that you gave him when you were in the position of assistant superintendent, between December, 1971, and up to July of 1972, were there any kinds of classes or lessons given by you as assistant superintendent to the porters and handymen of the building?

A Yes, I did.

Q Will you describe that? Tell the jury about that and how it worked generally.

A Like every two weeks I would give a class or a speech, and if there is something to be changed in the buildings or if there is a holiday coming up, and then it was to refresh their memory about the compactor, more or less for the safety, make sure that you shut off the machines, if you have

any trouble with the machines, they break down, please notify me or Cris at the time, and we will take care of it from there.

Q Did the building have an arrangement with some service company that was on 24 hour call?

A Yes, we had a service contract.

Q And they were available 24 hours?

A Yes.

Q Anybody in a supervisory capacity in the building to work on that compactor, if necessary?

A Yes.

Q How were the porters notified or given notice of a meeting or a speech by you? How were they notified?

A A day before the speech I would put a notice on the time clock and they would read it. Like one o'clock on Tuesday there will be a meeting at the compactor or in the supply room.

Q Where were these meetings generally held?

A Generally in the supply room.

Q Can you estimate for us how many of these meetings you had between January 1, 1972, and July, 1972, a seven-month period?

A A seven-months period?

Q Yes, from January 1, 1972, to July, 1972, is about

seven months. Give us an estimate approximately how many meetings you had.

A More than ten meetings.

Q More than ten?

A Yes.

Q Can you tell us how many involved the compactor, if any?

A All of them.

Q Did you ever instruct Mr. Merced specifically -- withdrawn.

I ask you very specifically, Mr. Diaz, did you ever instruct Mr. Merced to ever put his hand in that machine while it was working?

A No, sir.

MR. SHANDELL: Objection. Leading and suggestive.

THE COURT: You are right. It is.

MR. SHANDELL: He was asked repeatedly what the instructions were. We got them several times.

THE COURT: I know, but since it is all out in the open and has been for some time I will allow it.

Q Did Mr. Nelson ever tell you to tell Mr. Merced to put his hand in the machine while it was working?

A No, he did not.

Q Did you ever instruct Mr. Merced to take out carpets?

A No.

Q Did you ever tell Mr. Merced to take out wine bottles?

A No.

Q Did you ever instruct Mr. Merced to take out pieces of wood?

A No.

Q When the compactor was opened, that is, when they pushed the button on and the garbage was being taken care of, was the porter assigned to the building required to stay with the machine or was he free to go throughout the building?

A Stay with the machine.

Q Can you tell us approximately how long it would take, speaking generally now, for building number seven where Mr. Merced worked, how long it would take for the garbage to be completed, that is, the cycle, under normal conditions in a morning session? How long would it take for that garbage to be packed and tied and garbage removed?

A About an hour and a half.

THE COURT: Anything else?

MR. ISAAC: Bear with me, your Honor. I am looking at some notes.

THE COURT: All right.

(Pause)

Q May I ask you to look at your drawing, sir, the one you drew on the blackboard. Where this point of the arrow is and where my finger is located, sir, is that the chamber or the compartment for the ram which extruded the garbage?

A Yes, sir.

Q Is there any opening above that compartment?

A No, sir.

Q Is there any kind of an opening of any kind above that compartment?

A No, sir.

Q And if you were to hit the top of that compartment, would there be any kind of a hole leading up to any kind of a chute?

A No, you would hit the trap door, trap door on top.

Q Trap door on top of this compartment?

A Yes, sir.

Q That is made out of metal, I take it, or steel?

A Steel.

MR. ISAAC: May I take ten seconds or so, Judge?

(Pause)

MR. ISAAC: Thank you. No further questions.

THE COURT: Do you have anything, Mr. Ivone?

MR. IVONE: No, your Honor.

MR. KOHLER: No, your Honor.

MR. REGAN: No, your Honor.

MR. WILENSKY: No questions, your Honor.

THE COURT: Mr. Shandell.

CROSS EXAMINATION

BY MR. SHANDELL:

Q Mr. Rivera --

MR. IVONE: Diaz.

Q Mr. Diaz, when was the first time you knew you were going to have to come to court to give testimony in this case?

A When did I know?

Q Yes.

A I got subpoenaed on the 4th. That was the 3rd.

Q That would be when?

A Monday.

Q Last Monday?

A Last Monday, right.

Q Between last Monday and today, have you had occasion to discuss with Mr. Isaac here what your testimony would be in court?

A Yes.

Q And this gentleman here, Mr. Isaac's associate?

A Yes.

Q As a matter of fact, you were around on Friday, were you not, all day?

A Thursday.

Q On Thursday. Sorry. All day?

A Yes, sir.

Q Mr. Rivera was here and the two of you were together?

A Yes.

Q Did the two of you discuss with the various attorneys and representatives representing some of these defendants what it is your testimony would be about when you got on the stand?

MR. IVONE: Objection, your Honor, unless he wishes to break it down.

THE COURT: I think I will agree with that, Mr. Shandell, because now we have mixed it up with various attorneys.

MR. SHANDELL: Thank you, your Honor.

Q While you were here on Thursday, did you have several discussions with Mr. Isaac about this case?

A Yes.

Q With this gentleman here about this case?

A Yes.

Q With Mr. Ivone about this case?

A No, sir.

Q With Mr. Ivone's assistant?

A Yes, sir.

Q And did you see Mr. Rivera having discussions about this case in your presence with these gentlemen?

A They were talking about it, but I wasn't paying attention because they wasn't talking to me.

Q As a matter of fact, after Thursday's testimony was over you all gathered in the hall, Mr. Isaac, Mr. Ivone, some of the other gentlemen, and discussed what happened in court that day, did you not?

A More or less, yes.

Q Now, Mr. Diaz, the porters at Southbridge Towers were issued, in connection with their work with the compactors, sticks.

A When I took the position of assistant superintendent, the sticks were there. I did not issue them.

Q But you knew they were there?

A Yes, sir.

Q And you knew they were supposed to be used in connection with the compactors, right?

A Yes, sir.

Q Did each compactor room have a stick for each

compactor?

A Yes, sir.

Q And these sticks were issued to the porters?

A Yes, sir.

Q For them to use, is that correct?

A Yes, sir.

Q This wasn't just for you to use or for Mike Herman to use, this was for the porters to use, is that correct?

A Well, for the porter that was working on the compactor.

Q For each porter who had each compactor had a stick and the stick was for him to use, is that right?

A Yes, sir.

Q The stick was for him to use to break up blockages as they occurred in the compactors, is that correct?

A That's correct.

Q Were those the instructions the porters had?

A Yes, sir.

Q In connection with your work as a supervisor, did you ever receive any instructions from anybody connected with the manufacture or the installation of this compactor about how to use it, how to work it?

A When I was a porter at the time, I got instructions

from Luis Rivera. He was the assistant superintendent at that time. He is the only one I got instructions from.

Q You were working here from 1970 on, you said.

A Yes.

Q And you were never part of any class where the porters were gathered together and told by the manufacturer or the installer how to operate this unit?

A I was. I was at the time with Luis Rivera. At the time I was a porter for three months.

Q Who told you how to work the machine, Luis Rivera or the manufacturer or the installer of the machine?

A Luis Rivera.

Q Just Luis Rivera?

A Yes, sir.

Q You never got instructions from the people who built or installed the machine, or did you?

A No, I did not.

Q Did Luis Rivera teach you about the stick?

A Yes.

Q What did he teach you about the stick?

A In case in the chute itself there were any stoppages, to make sure to shut off the machine, the safety on the machine, and to poke the inside with the stick and push it down, and in case that didn't work, I would have to

shut the machine off and get in touch with one of the supervisors and that's when he would give me a hand with the cinder block and the man would go on the second floor up and push it down.

Q But Luis Rivera, he knew that these sticks were issued to the porters for their use in trying to break up blockages, is that right?

MR. ISAAC: Objection as to what somebody else knew or didn't know.

THE COURT: Yes, sustained.

Q Did Mr. Rivera tell you that these sticks were issued to the porter for use in breaking up blockages?

A I can't recall on that.

Q Did he tell you to use the stick at all?

A Well, when I was a porter at the time, no.

Q He didn't tell you to use the stick at all?

A No.

Q So you received no instructions in the use of this stick --

A This is after. Excuse me. This is after I came. The sticks were there.

Q While you were a porter you received no instructions in the use of this stick?

A No, sir.

Q From Luis Rivera or anybody else?

A No, sir.

Q And when you became an assistant superintendent did you get any instruction in the use of this stick?

A Yes, I did, because at that time --

Q From whom?

A From Mike Herman. The sticks were there at the time when I took over possession.

Q So now you say it was Mike Herman who issued these instructions to you about how the sticks were to be used, is that what you said?

A That's what I said.

Q Not Luis Rivera at all?

A When I was porter there at the time, the sticks wasn't there. When I became assistant superintendent in '71, the sticks were there and then he showed me how to explain to the porter the use of the stick.

Q Mike Herman did?

A Yes, sir.

Q Luis Rivera didn't explain to you?

A No, he didn't.

Q These blockages, you have drawn a picture there, where did these blockages occur?

A Just before the opening there, where the arrow

is pointing right now. It says "garbage."

Q Underneath the chute?

A Inside the chute.

Q In the machine itself?

A On the chute. Yes, in the machine itself.

Q And you would have to reach up to that part there at the top of the machine to break up the blockages?

A Yes, sir, with the stick.

Q Excuse me?

A With the stick.

Q With the stick.

A Right.

Q How far do you say that distance was?

A I say it was about five feet standing. Now, the porters used to stand on the machine where I pointed out over there. You say you have three feet there?

Q How big do you think it is?

A Three feet. It looks like four feet to me.

Q They would have to do this through an open hopper door, is that correct?

A Excuse me?

Q They would have to do this through an open hopper door?

A Yes, sir, but the machine has to be shut off at

the time.

Q I will get to that in a minute. The hopper door turned down like this, didn't it?

A Yes, sir.

Q So you would have to put your chest or your belly, depending how tall you are, against that hopper door which would come out from the front of the machine?

A No, you don't.

Q You would be standing on the side of the machine? You could get over to the side like this, is that what you are saying?

A Yes.

Q And shove up like this, is that what you say?

A Yes, forcing the garbage down on the side.

Q And force the garbage down?

A Hit it on the side and it will force it down. In case it didn't come down like that, that is when we used the cinder block on the second floor.

Q And you told the porters as part of your instructions that they were to stay there all the time with that machine while it was digesting garbage, is that right?

A Yes, while there was garbage in the machine.

Q While there was garbage in the machine. I am sorry. I used a little levity. While there was garbage in

the machine they had to stay there, right?

A Yes, sir.

Q And when the garbage was all taken care of they would turn off the machine before going about their business, is that right?

A That's correct.

Q Did anybody ever tell you that you should leave that machine on all the time?

A No.

Q Did anybody ever tell you that the machine was automatic and didn't need a porter to attend it?

A It was automatic but if there's any little piece of paper that would fall into that chute, it would trigger that electric eye and the machine would go constantly but yet it would be pushing no garbage at all. So why should you have a machine steady on if there is no garbage in the machine when you should shut it off? We used to tell them shut it off, come back after he takes care of his duties in the building itself, check the garbage and put it on yourself.

Q Isn't the reason you told the porters to stay there all the time was that if you found that if they didn't stay there all the time the garbage would stack up above the electric eye and wouldn't be processed?

A Say that again.

MR. SHANDELL: Would the reporter read the question?

(Question read)

A Yes, that's true.

Q So the porters were instructed to stay there --

A While there was garbage in the machine.

Q While there was garbage in the machine to make sure the garbage didn't stack up above the electric eye and would stay there and the machine wouldn't be processing garbage?

A That's right.

Q And they had to stay there and see it didn't get stuck and when it got stuck to use this stick to unstick it?

A If it got stuck in the chute.

Q Or in the machine?

A Not in the machine.

Q It never got stuck in the machine?

A Yes, it did.

Q Didn't they have to unstick it when it got stuck in the machine?

A Not with the stick.

Q With what?

A They would shut the machine off, open up the lid. Usually it would never stick in the machine itself, in the drum.

Q I am not talking about the drum, sir. I am talking about the part of the machine, the containers that holds the garbage above that cylinder or drum.

A In the chute.

Q Along that sliding path?

A Yes.

Q That's what you are talking about, what you call the chute?

A Yes, sir.

Q We are talking about the angled sliding path. Is that what you are talking about?

A I was talking about the drum itself. If there is garbage on the ramp, the garbage would slide down into the drum. But if in the chute itself the garbage got stuck, that is when he took the stick and helped the garbage forcing it down.

Q Didn't the garbage also stick along the sliding ramp?

A Once in awhile it did, yes, sir.

Q And he would have to unstick it, too?

A With the machine off, yes.

Q Your porters were required by your company to work with this machine with a stack of garbage that started out in the morning up the chute a story or two stories, or something like that, is that right?

A Yes, sir.

Q Now, if the garbage came down to the bottom of the chute and stuck somewhere in the neighborhood of that chute -- right?

A Yes.

Q -- he would have to unstick it, right?

A Yes, sir.

Q And when the next bag or box falls through, wouldn't it stick again exactly what happened because you had it stacked up like that?

MR. ISAAC: I object to the form of the question.

THE COURT: Sustained as to form.

Q Isn't it a fact, sir, that when he would unstick that piece of garbage under that chute there, the next piece of garbage would fall through and just create another jam?

A Maybe not.

Q But then yes?

A It could be.

Q And if he had to get all of that garbage disposed

of in an hour and a half and he was going to go and turn off that switch each time he tried to unstick a piece of garbage, he couldn't get that job done in five hours, could he?

A That's correct.

MR. SHANDELL: I have no further questions.

MR. ISAAC: May the witness finish his sentence?

THE WITNESS: But he knew if he had a problem with the machine he would get in touch with them and then I would give him an extra man to help him take out the garbage in enough time and nobody was rushing the guy. Nobody ever rushes the guy on the job.

REDIRECT EXAMINATION

BY MR. ISAAC:

Q You were asked by Mr. Shandell whether you spoke to me about the case. Of course you did, didn't you?

A Yes, sir.

Q You spoke to me on more than one occasion about the case?

A I even spoke to Mr. Merced and his attorney.

Q You spoke to who?

A Mr. Merced.

Q When was that?

A I spoke to him in the hallway, he came to my house Thursday evening and knocked on my door and I spoke

to him then.

Q What Thursday evening? This Thursday?

A That's correct.

Q Bear with me, please. This Thursday was the last day of court?

A Right.

Q I told you to come back Monday morning, right?

A Yes.

Q Because Friday we couldn't work that day?

A Right.

Q That last court session before today Mr. Merced came to your house?

A That same evening with some other gentleman. I never saw him before.

Q Did you talk to him?

A Yes, I did. I told him I can't talk to him because I have been subpoenaed and Monday I have to go in front of the judge and whatever I have to say I would say in the court.

Q Do you know who the other gentleman was with Mr. Merced?

A No, I never saw him.

Q How long did he talk to you, approximately?

A About fifteen minutes, ten minutes. I didn't

let him come into the apartment. I told him I couldn't talk to nobody.

Q Did he ask to come into the apartment?

A Not really.

Q Did you see Mr. Merced Thursday when you were in court waiting for your turn?

A Yes, sir.

Q Did he see you?

A Yes, he did.

Q And that evening about what time did he come over to your house?

A A little after seven, I guess.

Q Do you recognize anybody here who was with him?

A No, sir.

Q The other man that was with him, was it a man?

A Yes, it was.

Q Did he talk to you?

A Yes, he did.

Q Did he tell you who he was or where he was from?

A No, he didn't.

Q What did he say to you?

A He just said that if I could help Merced out, the guy's a little nervous and what I am going to tell the

jury on that Monday would be the honest truth and I said yes, I will. I will see you in court on Monday.

Q One or two other questions.

When you took over the job as assistant superintendent in 1971, were the sticks that have been referred to in this testimony, in your testimony, were the sticks already there?

A Yes, they was.

Q Do you know the first day those sticks were in the compactor room or do you have any idea about that?

A No, I don't have no idea.

Q You do know when you took over the job the sticks were already there, right?

A Yes, sir.

Q Did you ever see it take five hours to clear out the garbage in building number seven since you have been the assistant superintendent?

A Unless if the machine was broken down and wasn't working at all, you had to call service, and then I would give him a man, they had to hand-feed the garbage out.

Q Other than the breakdown of a machine where you had to call a serviceman, did it ever take five hours to clear out the garbage there?

A No, it did not.

Q Could you tell us approximately the longest it took to get the garbage out if the garbage was up to the second floor?

A I would say an hour and a half with no interruption.

Q One other question. Did you ever give any instructions to Mr. Merced that he had to finish the garbage operation within a certain time? Did you give him specific times when he must be out of there?

MR. SHANDELL: Objection, your Honor.

A No, sir.

MR. SHANDELL: Leading and suggestive.

THE COURT: Overruled.

A No, sir.

MR. IVONE: May I ask some questions?

THE COURT: Sir?

MR. IVONE: May I ask a couple of questions?

THE COURT: All right, go ahead.

RECROSS EXAMINATION

BY MR. IVONE:

Q When Mr. Merced came to you the other night, on Thursday, did he talk to you himself?

A Yes, he did.

Q Did he speak to you in English or in Spanish?

A Both.

Q Both English and Spanish?

A Yes.

Q And in response to Mr. Isaac's question as to talking to anybody else, you indicated earlier Mr. Merced and you nodded as though his attorney. Did any of his attorneys talk to you, Mr. Merced's attorneys?

A No.

Q In answer to a question by Mr. Shandell here concerning clearing blockages, in this particular machine in building number seven, in the course of a morning's job how many blockages were there?

A In the morning?

Q Yes, in the course of a morning, let's say.

A Usually none.

Q And occasionally --

A It would depend upon what would the tenant throw. If they would throw a cardboard box, it will prevent the rest of the garbage from coming down because the box itself would get clogged up in the chute itself.

Q But otherwise it usually would not be blocked, is that it?

A That's correct.

Q In answer to another question by Mr. Shandell,

you told us that Mr. Rivera had originally given instructions to you on how to operate the compactor.

A Yes.

Q And you mentioned at another point that there were -- I don't know whether there were classes or some instructions by the installer but you didn't attend.

A I didn't attend that.

Q Do you know if Mr. Rivera attended them?

A Yes, he did.

Q How about Mr. Herman, did he attend them?

A Yes, he did.

Q Do you know if Mr. Nelson attended those classes or instructions?

A I don't know.

Q Were they actually some type of classes that were given by the installer, is that it?

MR. ISAAC: Let's find out if the witness knows.

THE COURT: I would agree.

MR. IVONE: I will withdraw it.

That's all.

THE COURT: Anything else, gentlemen?

MR. SHANDELL: One question, your Honor.

THE COURT: Go ahead.

RECROSS EXAMINATION

BY MR. SHANDELL:

Q Mr. Merced and the person who came to see you Thursday night, they asked you to tell the truth in court today and you agreed?

A Yes, sir.

Q They didn't ask you to tell any lies or anything like that?

A No, they did not.

THE COURT: Thank you, Mr. Diaz. You may be excused.

Now, Mr. Isaac, does Southbridge want to offer any more evidence?

MR. ISAAC: Yes, sir. Southbridge would like to read a portion of the examination before trial of the installer of the machiner, Universal Thermal Industries.

THE COURT: Could you give us the name of the witness?

MR. ISAAC: I certainly will, your Honor.

THE COURT: And the date his deposition was taken.

MR. ISAAC: This is the examination before trial of Universal Thermal Industries by Jordan Danziger, D-A-N-Z-I-G-E-R on November 25, 1974, held at the office of Morris, Duffy, Ivone and Jenson, 233 Broadway in New York, New York. Starting

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with page 41, line -- the first question on the page. I will read the entire page, your Honor.

MR. IVONE: Hold it just a moment so I can get it.

What line are we going to start with?

MR. ISAAC: Line 4, first question.

"Q In your experience with these machines and observations, have you ever observed any circumstance or conditions where there were blockages or jam-ups of a machine?

"A Yes.

"Q Can you tell us under what kind of circumstances or conditions in the operation that cause it to block up or jam up? Is it something in the manner the garbage comes down through the chute?

"A Yes, it is called bridging.

"Q Bridging?

"A Yes.

"Q Can you give me a little different description or definition of what bridging is?

"A The refuse falls in a manner that creates an arch, and that arch of refuse in turn supports the column that rests on it in the chute and prevents it from continuing to fall into the charging chamber.

"Q When this bridging occurs, I guess it is

"a matter then of clearing this. What do you call it, an obstruction?

"A Yes."

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"Q Is there any provision for clearing an obstruction such as you describe occurred in bridging?

"A There are a couple of ways. The most common is to open the door and free it with a stick or some implement to poke.

"Q Is there any kind of implement provided with the machine when it is installed to make these clearances?

"A No.

"Q Are there or were there any instructions or included any instructions how to make these clearances when a blockage occurs by reason of bridging?

"A No."

Your Honor, I must say at this time I don't know if page 67 was read. May I inquire of counsel? If it has been read, I will sit down.

No, I see it has been read. I have a note on it. Thank you very much.

THE COURT: Does Southbridge rest on the issue of liability?

MR. ISAAC: The third party defendant Southbridge

rests.

THE COURT: Does the third party defendant Universal wish to offer any additional evidence?

MR. REGAN: No, your Honor. I rest.

THE COURT: How about the third party defendant Charter?

MR. WILENSKY: I rest, your Honor.

THE COURT: Ladies and gentlemen, we will take the afternoon recess as far as you are concerned, and we will resume, I would say, in about ten or fifteen minutes. Counsel please remain.

(Jury leaves courtroom)

THE COURT: Do you have any motions, Mr. Ivone?

MR. IVONE: Yes, your Honor. First of all, with respect to the defendant Albert Shayne, and I am taking it separately, your Honor, as I understand it he was sued here as the president of Auto Pak.

THE COURT: I thought he had been released from this case long ago.

MR. IVONE: He was never. I think there has been no proof that he, as an individual, is in any way involved other than as a president of the corporation. I think the case against him should be dismissed from all sorts of actions.

THE COURT: I don't know of any proof or anything

to tie Mr. Shayne into this case. I thought he had been discontinued long ago.

You don't deny that, do you, Mr. Shandell?

MR. SHANDELL: No, your Honor, I would be very pleased to discontinue the action against Mr. Shayne.

THE COURT: On that note the case is discontinued against the defendant Albert Shayne, spelled S-H-A-Y-N-E, according to the appearances.

MR. IVONE: As to the only remaining defendant I represent, Auto Pak Company, Inc., your Honor, I would respectfully renew my motions at the end of the defendant's case and ask for a directed verdict in favor of that defendant.

First, may I respectfully call to the Court's attention that basically the testimony of Mr. Aaronson was suggestive that the design in this particular machine was not of the best, and that is basically the highlight of his testimony, not of the best. That hardly forms a criterion for a deviation from proper manufacturing or design practices.

THE COURT: I am going to reserve decisions once again on these various motions of Auto Pak. By the way, I treat Auto Pak for present purposes as including Mr. Kohler's client. I am going to reserve decision on all motions, including the motions for a directed verdict. I am going to put the issues of negligent manufacture and breach of

warranty to the jury.

MR. KOHLER: As to me, too, your Honor?

THE COURT: Yes, sir.

MR. KOHLER: There has been no showing of fact or law --

THE COURT: I am not convinced you still belong in the case but I am not going to dismiss you yet because for practical purposes I regard your client as being the same as Auto Pak for purposes of determining whether or not there was liability, which is the first question we are going to put to the jury, as you know. So all motions that you might make at this stage I am going to reserve decision on, too.

What about you, Mr. Isaac, on behalf of Southbridge?

MR. ISAAC: Your Honor, I am really prepared to give a rather lengthy argument to the Court.

THE COURT: We have been listening for five days now all about this machine. You don't have to be lengthy. What is your position?

MR. ISAAC: That is what I was going to add to my original statement. I don't believe it is really necessary.

Southbridge does not belong in this case as a matter of law. We are a third party defendant. The third party plaintiff has no cause of action of actionable negligence

against my client. There has been no proof here of any legal sufficiency to warrant a finding that there was a deviation insofar as instructions are concerned, that there was a failure to instruct. There is no showing as a matter of fact, your Honor, as a matter of law, that the third party plaintiff has a legitimate cause of action against my client.

THE COURT: Let me point out that it seems to me that is a good question of fact. According to Mr. Merced if any jury was to believe him, which this jury is certainly entitled to do if they wish to, he says he never got any instructions from anybody.

MR. ISAAC: Your Honor, he said many things, but the Court must first examine and analyze the facts before it goes to a jury on a question of fact. I am saying to the Court --

THE COURT: I am saying as the judge I am not the fact finder. You never left it up to the Court to decide these issues. As far as I know, it is a jury issue.

MR. ISAAC: I am saying the case should be dismissed against my client as a matter of law.

THE COURT: I just got through saying there are issues of fact here.

MR. ISAAC: I can't see any issues of fact, your

Honor.

THE COURT: I can see one. Your people say they all gave instructions both to Merced in particular and through these classes every fortnight as Diaz, for example, just described it. Merced says quite a different thing. He said nothing like that ever happened.

MR. ISAAC: Mr. Merced is not suing my client, number one. Number two --

THE COURT: Under New York law, as I understand it, if this jury is to determine there is liability from Auto Pak to Mr. Merced, Mr. Ivone, no matter what you may think about him, is duty bound, as I see it, to argue that they are entitled to a contribution from Southbridge on the theory that you failed to adequately instruct, warn, et cetera. Wouldn't you want to argue that, Mr. Ivone?

MR. IVONE: Yes, your Honor.

THE COURT: No doubt about it, I don't think.

MR. ISAAC: I don't think it is a question of what Mr. Ivone would like to argue.

THE COURT: I do. He is entitled --

MR. ISAAC: I am saying to the Court, number one, there is no legal -- legal -- question of fact for the jury; number two, if a verdict is rendered against the third party plaintiff, which also is the defendant Auto Pak,

implicit in such a determination, if such a verdict is rendered, implicit in that must be a finding of negligence and/or breach of warranty and proximate cause and the jury will have determined that that was the cause of the accident.

THE COURT: You are so wrong. For many, many, many decades it has been well understood in the common law and otherwise that there can be several proximate causes of an accident or injury. So that disposes of your argument right then and there.

Number two, we live in the world of -- I can never remember whether it is Dole versus Dow Chemical which I have here on my desk somewhere, and then Mr. Ivone will be entitled to put it up to the jury, since the issue was not reserved for the Court, as to whether or not there should be a contribution from your client.

MR. ISAAC: Dole-Dow never changed the existing law requiring a necessity for a party making a complaint to have in law a prima facie case either in negligence and/or warranty.

THE COURT: Exactly. I agree with you. I just got through telling you I think there is an issue of fact. I will tell you what I will do. I will reserve decision on your motions and control the matter, but I am still going to put it to the jury at some point if there is a verdict

for the plaintiff on liability as against Auto Pak.

MR. ISAAC: I have also a motion for a directed verdict, your Honor.

THE COURT: Directed verdict, I will reserve decision on that.

MR. ISAAC: I also have a motion, sir, for judgment -- summary judgment on the basis of my client's counterclaim against the third party plaintiff for breach of warranty. I say to the Court that if the plaintiff prevails against the defendant on breach of warranty, then my client is automatically entitled to indemnity over on the same breach of warranty, your Honor.

THE COURT: I am going to reserve decision on that. That again depends on several things, including issues of fact. So that motion is denied without prejudice to renew at some later stage, if need be.

What about Universal, Mr. Ivone, do you claim you have proved anything against Universal?

MR. IVONE: Your Honor, first of all, it is not my purpose here to try to prove anything, really, against the defendants. I am relying primarily upon what the plaintiff claims. It is my understanding that the plaintiff has claimed and has not withdrawn the claim that there were no proper instructions given by the installer, namely, Universal,

to Southbridge. Only to that extent would Universal be here.

THE COURT: Wait a minute. I don't care what the plaintiff claims. Is there any proof to that effect?

MR.IVONE: Well, yes, I think there has. There has been some indication as to exactly what it was that the installer told Southbridge and a jury can believe it or not. If the jury believes that the installer did give the instructions -- incidentally, your Honor, I am going to urge upon the jury to believe that, but if they so believe it, then the installer is out. On the other hand, if they disbelieve it, the installer is going to be in.

THE COURT: Mr. Regan, what do you say?

MR. REGAN: I am a little at a loss to understand this argument.

THE COURT: I can't say that I blame you.

MR. REGAN: The plaintiff apparently has made claims against Auto Pak which Auto Pak says there is no evidence to substantiate but if in the alternative they would like judgment over against my client and there is no evidence in the case whatever to substantiate such a claim against Auto Pak, certainly there is no evidence to predicate a third party action on.

THE COURT: I must say I am inclined at this

point to sympathize with your position. I really don't see much of a case, assuming Auto Pak is found liable to plaintiff, I don't see much on the theory of claim over against your client. I don't see what they did wrong. I am going to reserve decision and wait and see what happens on the issue of liability in the main case, which we are going to put to the jury first. So I will reserve decision.

MR. REGAN: So the record is clear, Judge, I move to dismiss the cause of action for negligence on the ground that there is no evidence whatever nor any negligent conduct on the part of Universal and that the cause of action for breach of warranty on the same grounds.

THE COURT: I will reserve decision on those motions depending on what happens later. We will figure out what to do.

What about Charter?

MR. WILENSKY: If your Honor please, I move to dismiss the third party claim against Charter Compacting and the third party cross claims by the co-third party defendants against Charter. There has been not one mention by name of Charter Compacting throughout the course of the testimony. There has been no testimony with reference to the repairs, whether they be good, bad or indifferent.

THE COURT: I agree. I don't see why Mr. Ivone

hasn't conceded on that one. Don't you concede as to Charter? There is nothing here.

MR. IVONE: I thought at the beginning of my case I stated quite clearly I would discontinue against Charter. However, one of the other defendants, third party defendants, who has cross claims against Charter refuses to withdraw the cross claim.

THE COURT: Forget about them. We are talking to you as the representative of the Auto Pak.

MR. IVONE: I have nothing whatsoever against Charter on the grounds that they came in apparently only to repair this one month prior to the accident.

THE COURT: There has been no testimony about Charter, period, right?

MR. IVONE: There has been testimony about Charter, but only they were a successor to Universal.

THE COURT: So what does that prove? The motion of Charter to dismiss the third party complaint against it is granted, Mr. Wilensky, and you are free to go.

MR. WILENSKY: What about the cross complaints of the co-party defendants?

THE COURT: They are dismissed, too. All claims against your client whatever they are labeled in this case are dismissed for failure of proof.

MR. WILENSKY: Thank you.

THE COURT: Gentlemen, I am going to rule on the requests to charge on the issue or issues of liability as between plaintiff Felix Merced -- wait a minute -- I beg your pardon. I am right -- Felix Merced and the Auto Pak defendants and we are going to sum up to the jury on those issues alone and we are not going to even discuss the third party issues until, if, as and when we get there. That means we will hear closing arguments from Mr. Ivone and then Mr. Shandell and then instructions for the jury on that subject. Then, depending on what happens, we will then hear more arguments, this time from Mr. Ivone and counsel for Southbridge and perhaps Universal, depending on what happens. Do you follow what I am saying? We will do this in compartments so that there will be a minimum of inefficiency, lost time and confusion.

Now, on the requests to charge --

MR. REGAN: For the record, I would like to except to your Honor's ruling in that regard.

THE COURT: You would like to except to what?

MR. REGAN: To my not being allowed to sum up.

THE COURT: You will be allowed to sum up if need be, but not now.

MR. REGAN: I understood I was only going to be permitted to sum up in the event the plaintiff is successful

against Mr. Ivone.

THE COURT: Wouldn't you agree if plaintiff is nonsuited by the jury that ends the case?

MR. REGAN: Yes, your Honor.

THE COURT: Then why should you bother about summing up now? You may never have to sum up.

MR. REGAN: I think I should be out of the case, but if I am going to be held here on a hypothetical --

THE COURT: You are being held here, if you want to put it that way, on a hypothetical. If you don't understand what I am talking about, I am sorry.

MR. REGAN: I understand you completely. My objection --

THE COURT: I doubt it. But, in any event --

MR. REGAN: My objection is I am not being permitted to comment to the jury on this hypothetical situation.

THE COURT: You will be entitled to comment to the jury and argue to the jury if need be, but not initially.

If you want an exception to that, you certainly may have it because the record shows, I hope, clearly what we are going to do.

Now, with regard to the plaintiff's requests to charge, Mr. Shandell, I will charge in substance, albeit not in haec verba your requests except for number seven which I

deem confusing and unclear in this context.

MR. IVONE: Which one is that, your Honor?

THE COURT: Number seven, I repeat. I will not so charge. I will not charge number ten because I deem it to be nothing but a reworking of earlier requests which I will charge. I will not charge number eleven.

Now, as to the defendants Auto Pak -- I am having trouble finding any requests from Auto Pak. Here we are. I beg your pardon -- I will charge numbers one through five in substance. Thereafter it seems to me, Mr. Ivone, you get into third party charges which I will not charge initially. That takes care of number six which has to do with Charter, correct? You follow me?

MR. IVONE: Yes, your Honor.

THE COURT: Number seven goes back to your main defense which I will charge in substance. That is nothing but a New York pattern jury instruction, 104 of Section 2, which I will charge. I will charge number eight in substance. I will charge number nine in substance.

All of the rest of the requests I find to be really third party charges and I won't rule on those now. I will rule on those later.

Now we will proceed as soon as the jury comes in to have arguments as between the plaintiff and the defendant

Auto Pak. I assume, Mr. Kohler, that you won't be bothering to argue, but you tell me.

MR. KOHLER: No, your Honor, I won't argue.

THE COURT: Mr. Ivone will proceed first and then we will hear from you, Mr. Shandell, and then I will charge the jury and see what happens. Depending on what happens we will have further argument and further instructions as need be to the jury.

MR. ISAAC: May we have our normal recess also?

THE COURT: You certainly may have five minutes. How is that?

MR. ISAAC: It is more than I asked for. Thank you, Judge.

(Recess)

(Jury present)

THE COURT: Ladies and gentlemen of the jury, before we go to the next phase of our case, let me make two observations about things that have been ruled upon in your absence. First you will notice Mr. Wilensky is not here. The third party case as against his client, Charter Compactors, was dismissed by a ruling of the Court.

Now to get closer to the business at hand, we are going to proceed to have closing arguments first from Mr. Ivone on the part of Auto Pak and then from Mr. Shandell

as counsel for Felix Merced solely on the issue of the questions of liability, if any, on the part of Auto Pak to Mr. Merced. We are leaving aside, in other words, for the time being, the so-called third party lawsuits. We will get to them later as, if and when necessary. But originally we are going to put to you the final arguments of the plaintiff and the defendant Auto Pak only. Then the judge will instruct you on the issues as between those parties and you can make a determination there. Then, depending on your determination, we'll see what happens thereafter. In other words, the third party cases are going to be put aside for a moment until we can get a resolution from you of the issues as between Felix Merced and the defendant Auto Pak on the case in chief, and we are not talking about damages or anything of that kind now. We are solely going to be arguing and the judge will be instructing you to return a verdict on the issues of liability, if any, on the part of Auto Pak to Felix Merced.

In that vein, gentlemen, are you ready? Mr. Ivone.

MR. IVONE: Yes.

May it please the Court, Miss Stone, ladies and gentlemen, I think at the outset in my opening statement I gave you what I thought was a bird's eye view of the proof I expected to adduce in this case either directly through my

own witnesses or from witnesses from other parties. I also told you at that time to hold me to my promises to you as to the proof I intended to bring out to you as to how this incident happened, whether or not my client was at fault, whether or not Mr. Merced himself was at fault.

I think I have met my burden, my promise to you, and that is basically what this is all about now, have I come up with the proof, have I come up and convinced you, proven to you, that my contentions are correct.

I would like to thank you, first of all, in behalf of my client, Auto Pak. You notice that I now have mentioned my client in the singular. I have mentioned only Auto Pak. The reason for that is that the lawsuit as against Albert Shayne, who was my client, has been dropped by the plaintiff. Therefore, he is no longer in the case.

Now, I know you have been listening attentively. Some of the testimony has been on a technical vein, although not too technical, not as much as I anticipated. I want to thank you for your attention.

As a matter of fact, this case has not been very technical, has not been very technical because it is not really about the design of a machine, not really about whether a machine was of faulty construction or not, but basically this lawsuit has revolved around, no matter how you turned and

twisted, upon the acts of one Felix Merced. It has been the story of a man who has disregarded some elementary, basic safety aspects of just about any job.

And in that connection, it occurred to me during the trial and over the weekend why would he do such a thing. After all, there has to be a reason for it. People don't place themselves into a hazardous position, they don't place themselves into jeopardy unnecessarily. There has to be some reason for some foolish act, let's say. We know, obviously, a person may want to commit suicide, but a person will never put his hand and have his hand cut off and go around with a cut-off hand. Why?

I think Mr. Aaronson, as I thought about this, all the collective testimony, I thought Mr. Aaronson's testimony when I had thought I scored a point with him and asked him point blank, "Mr. Aaronson, would you put your hand into this machine without stopping it first?" He said no. And I said, "As a matter of fact, even if you had an interlock on there, would you rely upon the interlock and put your hand in there?

He said, no, he would still shut the machine.

Then on redirect Mr. Shandell asked him a question and he responded, but sometimes, he said, "even I may be in a hurry and perhaps I don't use all the caution that I ought to." And I think that is what happened on that morning, July

13, 1972. Mr. Merced was in a hurry and he took a shortcut. It is like the person who is driving a car and makes a quick left turn, "I think I can make it."

Nine times out of ten, maybe 99 times out of a hundred you make it, but that once that you do not, it is disaster. Is it the fault of the oncoming car? No, it is the fault of the person who takes that chance, that unnecessary chance. This is also the story of a person like any individual, yourself, myself, you don't have to have special knowledge, you don't have to have special knowledge to see the danger of putting your hand into a thing like that. Anybody with a little common sense knows that. You don't need education, you don't need great experience. Putting your hand into something like this is like putting your hands into a racing car, lift up the hood, put your car down. Maybe you want to try to get a little something away from the fan belt, take a chance, but if you miss and the propeller hits you, it may cut your hand off. That is what he did in this case.

It is like the person who ignores the guard on a common window fan you have. You have a guard on it. The guard is not impregnable. You put your finger inside just to clear something while it is operating, you know it is going to hurt your finger if you miss, if you miss, and he in this case

missed.

That is one highlight, one aspect, I would like you to pay attention to in considering this case. They are talking about interlocks, interlocks, interlocks.

Think for a moment about interlocks. There were no interlocks in 1970 on this machine. I told you also -- I brought out, at least, through Mr. Deutsch -- that none were required, and number three, Mr. Deutsch has testified that he examined this machine on November 21, 1974, four months ago. It has no interlocks on it now. And he also testified you can install them. I asked him purposely this morning, "Can you install interlocks on a machine that's already been manufactured?"

He said, "Yes."

That should be another clue to you that perhaps interlocks are not necessary. They could be installed and I am not saying this by way of criticism of Southbridge that they have not installed them. I don't think they are necessary to install and that is why they have not been installed.

Again on this question of interlocks, there has been much that you have to have interlocks because Mr. Merced told us all through the two hours of time that the machine would be in operation, let's say from eight o'clock

in the morning until ten o'clock, he would have to have his hand on the inside pounding upwards, pounding upwards. Well, first of all, we heard Mr. Diaz tell you here just a little while ago, if you pound directly upwards, first, you couldn't get the three or four foot pole up and you just look at the machine and you see how it would be impossible to do it; second, if you did that, you would be pounding against the metal plate, the door up on top. It wouldn't be going into the chute.

But more important, what do interlocks do? The interlock shut the machine. Well, Mr. Shandell has more or less criticized us for saying that Mr. Merced should have simply physically shut the machine. There is an on/off switch conveniently located, why shouldn't you shut it? They shouldn't want to shut the machine because you have to keep pushing this thing up all the time. If he has to stay in there constantly for two hours with the door open, if the interlocks were there wouldn't the machine be there constantly That is what they are saying they don't want to happen. They don't want the machine off. Mr. Shandell has told us that. So that if this machine is being operated really the way Mr. Shandell and his client have presented to you, that for the entire time that this machine is being operated that the door is open and he is constantly pushing with that pole, if the

interlock system were on the machine would constantly be off.

Another thing I would like to point out to you is that this trial and your consideration should be based upon the facts and the evidence and not upon sympathy. I know that he has lost his hand and I know that you should and you will feel sympathy, but that ought not play a part in your decision in this matter. I know you have to have seen that Mr. Merced has taken the sock off. Perhaps that has affected you. I am asking you, however, that while it has affected you you should not allow it to interfere with your determination in this case.

Another little highlight is the question of language: can he speak English or can't he? Now, that's important. Because not only is it whether he is telling you the truth here and whether he can talk to you in English and whether we in cross examining him can cross examine him in English and get a quick question and quick answer back, or whether he allows the time lapse of a question in English, understand it, have someone in Spanish translate it and get the chance to formulate an answer, but something more: when he spoke to Mr. Nelson, could he speak in English? When he spoke to Mr. Herman, could he speak in English? Both Mr. Rivera and Mr. Diaz were Spanish people, Puerto Rican. They may he could speak in English, broken English but he could

speak and he communicated and he spoke with Herman. So this brings up another aspect, what really are the instructions that Mr. Merced received.

We have learned now that he received instructions in Spanish and he received them in English, instructions which he has denied. And why is he denying it? Because he knows that if he was instructed to keep his hand out of that machine while it was operating, that he should not reach for anything to take it out and disregarded that, he cannot recover here. That is why, and that is why he is denying the English language, that is why he is denying any instructions.

Yet it was very interesting that when Mr. Deutsch was testifying, after all, he is an engineer speaking in English, probably a little faster than normal people, Mr. Merced -- I don't know if you noticed this -- apparently heard something and disagreed with him and muttered something in English which I wouldn't repeat here and walked out. I don't know if you noticed it, but these are the things you have to be alert to in the trial of cases.

The next thing. There has been a pounding out, what instructions did you put on this instruction sheet? Did you put on it in black and white, don't you put your hand in that machine when it is operating?

Well, first of all, Mr.Deutsch answered that

question and read various parts of it at length, and there was a reason for that, because it doesn't say in so many words, "Do not put your hand in there to take something out without stopping it," but if you were to read anything and understand how they want you to operate it, it means the machine operates by itself and when something has to be done inside of it you push back the ram with the reverse button and you stop it, and then you go in. For example, you want to change oil or check the oil, and it makes no difference whether you are checking oil or taking out an object that may be stuck there.

But more important on these instructions, they are telling us that we should have given written instructions. Written instructions to whom? To Mr. Merced? Are they telling us now that he could read in English? For whom are these instructions? The Southbridge people have just admitted without a doubt from Mr. Diaz himself, instructions were given. If you recall, he said, by the installer, by Universal. They were given to Herman, they were given to Rivera. He didn't know whether they were given to Nelson. Basically speaking, oral instructions by the manufacturer or by the installer are given to whomever the customer presents. In other words, if I am a customer and I have two employees, I only select one to be instructed, that's all the installer or the manufacturer can instruct. If they

present two people, then the two people will be instructed. So it is the choice of Southbridge as to who should be instructed. Then it is up to Southbridge in turn to instruct all the remaining people that they feel will be operating this particular machine.

It is my understanding and it is my impression from all the testimony that Herman, Rivera and Diaz in fact gave sufficient instructions to Mr. Merced on how to operate the machine and to be careful about it, to use common sense, ordinary caution.

If you agree that he was instructed, then definitely there should be a verdict in favor of the defendant.

I think I have established, as I promised that I would, that Mr. Merced knew all about the controls, he knew about the stop and the go switch. He turns it on every morning and turns it off. He knew about the wall switch. He knew about the reverse switch and, in addition, he even understood the so-called "magic eye", the photoelectric eye, but he calls it a magic eye. He also understood that when something goes across it, it interferes with it and starts the machine automatically. He knows also that if there is nothing in there it will stop automatically. He also knows that these teeth are about two and a half inches long. He also knows and he has admitted on his examination before trial that

these teeth can crush not only a hand but they can crush something more: they can crush a 2 x 4. I will leave nothing to the imagination.

Question from his examination before trial:

"Q Could these teeth chop up pieces of wood?

"A Well, if it destroyed my hand why wouldn't it chop up wood, too."

No question about that. There is no question also that he knew the machine was operating at the time he put his hand in it, and there is no question either that there was nothing preventing him from stopping the machine before he put his hand in.

Again on his examination before trial:

"Q When you say that it was going inside of the machine, what part of the machine are you referring to?

"A On the machine that was working.

"Q Did you reach into the machine to get the stick?

"A Well, they didn't tell me anything else.

"Q Did you reach into the machine, yes or no?

"A Yes.

"Q And the machine was working at that time

or was it not working?

"A Yes, the machine was working."

There is no question he knew it.

Incidentally, you know full well when you hear these garbage trucks and the high siren sound noise they make, it is a telltale sound when the hydraulic system works. That's the same type sound in this machine. You can't miss it. If you don't see it, you have got to hear it in operation.

Now, in order to excuse himself for having put his hand into an operating machine, he tells you the extraordinary story that, well, this 2 x 4 piece of wood would damage the machine and my boss told me to take it out, take any large object out which might damage it. First think about it for the moment. He says he never has been given any instructions, and yet he was given those instructions?

Second, everybody here would agree that a 2 x 4 piece of wood -- and he described it on his examination before trial as ten inches, ten inches in leng . I will find that in a minute. I will get to it -- as ten inches in length and you have heard from Mr. Deutsch, you have heard from the examination before trial of the inventor himself a 2 x 4 piece of wood can either be eventually chopped up by the machine or it will find its way out through the extrusion chamber. There is no reason to go in and take it out and

there is no reason why this should do any damage to the machine. This machine is made for that type of thing.

"Q How long was this 2 x 4 piece of wood?

"A It was about ten inches long.

Less than a foot, ladies and gentlemen, 2 x 4 less than a foot. What do you suppose -- do you notice how he is laughing at me? He understands everything I am saying. A 2 x 4 piece of wood ten inches long will easily find its way through the extrusion portion and if it doesn't, nothing happens because this has been figured out by Mr. Clar, the inventor. To do what? It was described to you earlier today that if for some reason the ram meets an immovable object it automatically goes in reverse after it builds up to 2400 pounds, 2400 pounds - per square inch. After it goes back, it then moves forward and then it goes back and forward, back and forward, and it can continue this operation indefinitely and if it is stuck all you have to do then is shut the machine and take it out or you just allow it to slowly ease out the particular obstruction such as a 2 x 4. Therefore, there is absolutely no reason to take it out.

Now, let us consider something else. Immediately after the accident is generally when you can figure out if someone gives a statement as to what has happened. That is about the most likely time he is going to be telling just what

happened. And we have here his story to Mr. Nelson, and it is dated July 13, 1972, and it was told to Mr. Nelson on that day and we have under item 3A a full description of the occurrence and he says, "Mr. Merced, the porter of the building, 90 Beekman Street, was cleaning the compactor in the basement."

In other words, now, he was cleaning it. He wasn't taking out any piece of wood. He put his right arm into the machine to remove some glass without shutting the machine. The machine started to operate and caught Mr. Merced's right hand, cutting off the hand near the wrist. "We rushed Mr. Merced across the street to Beekman Downtown Hospital. We also took the hand that was cut off to the hospital."

Now, jurors, you also heard Mr. Herman say that when he got there he looked in the machine and there was no stick in the machine, there wasn't a 2 x 4 in there, but there were broken pieces of glass. It may be that he was in the process of cleaning this after the operation was over. I don't know. But, in any event, it certainly is contrary to the story Mr. Merced told you here today, told you here last week.

I had wanted to read this earlier to you but I will read it to you now.

Two weeks after the accident, Mr. Herman gave a signed statement as to how the accident occurred, as to how Mr. Merced told him it occurred.

"July 27, 1972. I, Mike Herman, being over 21 years of age and am employed as chief superintendent for Southbridge Towers located at 80 Gold Street, New York, for the past years" -- I can't read the number of years -- "In our employment as a porter is a Felix Merced. Mr. Merced has been in our employment for approximately six months. He works at a salary of approximately $142 a week for a 40 hour week, being off Sunday and Monday. He works from 8:00 a.m. to 5:00 p.m. He belongs to Local 32" -- I think it is. "He was with us ten months prior to the six months but left us to go to Puerto Rico for a few months and then came back. His job was at 90 Beekman Street and his duties were to take complete charge of this building in reference to cleaning it and so on. In each building we have a compactor machine. The machine is in the basement. His job is to clean this machine. This machine is on all day. Each floor has a chute and tenants throw garbage through the chute and it goes down to the basement. This machine compacts the garbage and pushes it in plastic bags. To make this machine work, one has to turn a switch. Felix would open this machine twice a day, once in the morning and once in the afternoon. There is a

magic eye inside this machine. The switch is usually on off until someone wants to operate and then puts it on the on position. If the machine is on off and someone sticks their hand in the machine and passes the magic eye, it won't operate. The magic eye is only good when the switch is on. The purpose of the magic eye is so a porter does not have to stay there all day and watch garbage. When there is a lot of garbage, the garbage will pass over this magic eye and the machine will automatically operate. On July 13, 1972, Felix Merced was involved in an accident with the machine. What happened was there was a bottle stuck in the machine. Felix left the machine on the on position and stuck his hand in the machine to remove the bottle. When his hand passed the magic eye, the machine started up and he lost his right hand. This is the story he told me. The machine stopped and his hand was in the machine. He was bleeding bad, he was white as a ghost. He was then taken to Beekman Hospital by us. The hand was also taken. The police also came about one-half hour later and looked at the machine. The machine was not out of service after the accident. Nothing was wrong with it. No city inspector was here to look at the machine. In reference to the machine, we have a company by the name of Charter Compactor who takes care of it. No contract involved, just a call when they are needed.

"They have been servicing this machine approximately six months. We have a machine in each building, nine in all. We had another company before Charter. In reference to this specific machine, Charter last touched it on June 1, 1972, prior to the accident. It was a short in one of the switches. They were not called after the accident because nothing was wrong with it. It was not put out of service. In reference to Felix Merced's accident, he was instructed by me never to put his hand in the machine. All porters were instructed on this point. They were told if they had to go into the machine to use a three foot stick which we supplied to all porters when they started their job. Felix was also supplied a stick. I have no idea why he did not use the stick to take out the bottle. If he did like he was told, the accident would never have occurred."

You know, jurors, no matter how this machine was designed, no matter what, when someone disregards simple, basic elements of caution, an accident is bound to happen at some time. If it is not sooner, it is later. You can't take shortcuts when you are dealing with this type of machine. It is a machine, as you know -- I am sure Mr. Merced knows -- can be devastating. If you take a shortcut, well, if you get away with it, fine. If you don't, you can only blame yourself. In this case Mr. Merced is trying to blame Auto Park

He is trying to blame Auto Pak because there was no interlock. Let us consider that for a moment now.

Before I get to that I might add, you know, Mr. Merced has been telling you something about a bottle having fallen out and hit him on the head and dazed him and knocked him unconscious. I don't know which.

First, if there was a load of garbage still in the machine, a bottle could hardly have come from high points and fall free with force to be able to hit that angled deflection plate and come flying out of the hopper door. If it fell only from immediately above where he could possibly reach with his stick, the distance is what -- four, five feet? It would hardly come bouncing out knocking him unconscious. But something else. He didn't tell that to the hospital, he didn't tell that to anybody. Even several days later when Mr. Rivera went to see him in the hospital, he never said anything about any bottle hitting him in the head. As a matter of fact, in September of 1972, Mr. Aaronson went to look at this very same machine for his investigation in order to formulate some opinion and they never even told Mr. Aaronson about this manner of the accident happening. Basically, as far as Mr. Aaronson is concerned, he put his hand in there, that is how the accident happened. You remember when I asked him, Mr. Aaronson, was the machine operating when

he put his hand in it?

He looked at me as though I was crazy. Obviously it was operating, otherwise his hand never would have been cut off. And that's the first and basic act of negligence, putting your hand into the operating machine.

But going now to how the machine was made, how was it operated. Mr. Aaronson, I believe, has conceded that in 1970 there were no standards which would affect a compactor. He conceded also that the industrial code, which is the New York law on this, which would be controlling in th. type of -- control of industrial accidents, control of industrial machines, did not have any provision requiring an interlock on this compactor.

MR. SHANDELL: Objection, your Honor.

THE COURT: I don't quite understand that. Are you objecting because you think this does not accord with the evidence?

MR. SHANDELL: My objection is to Mr. Ivone instructing the jury on the law about what is controlling and not controlling.

THE COURT: I don't really think I understand him to be doing that, but to emphasize the point I will tell the jury it is not the function of counsel to instruct them on the law. I think rather, though, this was an argument

and I will allow the jury to decide whether or not they buy it on the facts and on the law which I give to them later. Go ahead.

MR. IVONE: I assure you jurors I am not trying to give you the law. It is my recollection of the testimony as elicited from Mr. Aaronson as to the importance and purpose of the industrial code. That was his testimony.

I also was able to bring out through my expert witness here, who testified also that the industrial code did not make such a requirement but, in addition, it did make requirements for guarding of dangerous machinery. What do we mean by guarding a dangerous machine? That's important. The dangerous machinery is on the inside. It is covered by metal all around it and a hopper on top and a closed door which is supposed to be kept closed at all times unless you shut the machine and you open it. That is what is meant by guarding. And, incidentally, it has been shown even by the plaintiff's own expert, Mr. Aaronson, that this door can be locked if you really want it locked. It is not necessary but it can be locked with a padlock if that is what you are complaining about, that it is too easy to open.

Mr. Aaronson then talked about the U.L., Underwriter's Laboratory, and the National Institute which then adopted the U.L. provisions. And what do we find in 1970?

That they say specifically interlocks are not required. They use the words "not specified." But if an interlock is put on, its efficacy can be determined by careful analysis and investigation based upon the use and provided it is not in a type machine where persons can be injured through gross negligence. In other words, if it is a type machine where a person would not ordinarily be injured, you would not be seeking an interlock. That's this type. Only where by gross negligence, and it is my contention that Mr. Merced here exercised gross negligence. He threw caution to the wind. Therefore, it was not a machine which required an interlock.

Further, today you saw Mr. Shandell bringing out a 1973 change which the judge has already told you does not apply to our machine which was made in 1970. But even as to that day it does not require or mandate an interlock You have either an interlock or you have a guarding, and that is exactly what we had here is a guarding.

Mr. Deutsch also brought out that the Board of Standards and Appeals has specifically ruled that in a case where the machinery is slow moving -- and Mr. Deutsch has pointed out that this is slow moving. It is about 30 seconds for the cycle, for this ram to go back and forth -- you do not require interlocks.

You know, sometimes you look at a witness and you arrive at your own conclusion, is he telling the truth or is he stretching it a bit. One of the first questions that was asked of Mr. Aaronson was whether he had an opinion as to the design of this particular machine, and he said, "Well, it is not of the best."

You know, in no way is that a standard of whether it is properly engineered or not. Not of the best. Even at that point he would not say, "No, this is inadequately engineered," because there was no requirement for an interlock and he knew it.

He told us that he worked for AMF. That was interesting because he said AMF probably would have put an interlock on a machine like this, and much to his amazement, he found out that AMF actually manufactured this machine. My client designed it all right, but AMF manufactured it. They knew. They have engineers. They knew there was no interlock here. There is no reason for it. That is what I am constantly saying. There was no reason for the interlock.

I think Mr. Aaronson has pointed to only two areas of interlocks, one the seat belts, and he conceded even as to the seat belts not only have they changed that, eliminated it, but you can defeat an interlock by simply taking out the plug which connects it. And the only other

one that he showed us an example is an interlock in elevators, but none with respect to compactors.

Do you recall my questioning of Mr. Aaronson when I pointed out, "Well, how about when you lift up the hood of a car and the engine is running, isn't that dangerous? Shouldn't you have interlocks on that?"

Of course, you don't have interlocks on the hood. It is dangerous, it is open and obvious. That's the point, it is an open and obvious danger when you open the door. When it is closed, there is no chance whatsoever that your hand can get caught on any part of the moving machinery. It is only when you affirmatively open the hood yourself and since you are doing it yourself you are either not going to put your hand in or you are going to be careful. Therefore, there should be no interlock. But he would not concede that there are no interlocks on cars. You all know that there are none. He said, "Well, maybe a Rolls Royce has an interlock."

He finally had to admit that on the millions of cars American manufacturers have put out there are never interlocks on hoods.

Much has been said here as to whether this is automatic or not. The only thing that is not automatic on this machine is that you have to tie up the garbage and

put more garbage bags to it. It even stops the moment the garbage bags are filled up. It stops if there is a fire. There is a thermal switch in there that shuts it. It stops if there is no garbage coming down. It starts if there is garbage coming down. But you do have to turn on the switch. We can all understand that.

Much has been said as to whether it is operating constantly or not. Generally speaking, it has been designed to operate constantly, and as a person throws down a bag of garbage it is supposed to push it out. It activates automatically. If a person, customer, chooses not to operate it constantly, that is not our concern. If they want to do it that way, that is their concern. They can do it. We do not fault them for it. But if perchance they have two stories full of garbage backed up and if there is any blockage or if there is any arching or whatever term you want to use, all you have to do is shut the machine, clear it, and then start it right on again without a problem.

You know, a witness was brought here by the plaintiff, namely, Mr. Melendez, his friend. One of the aspects of Mr. Melendez' testimony was that he said that when they used this pole they used it -- first of all, they used it pushing upwards. Second, they were not trying to unblock things, they were trying to get the garbage to come down faster.

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Well, if they have an hour and a half or two hours in which to do the job, perhaps that is why they are using the stick, to go down faster. I don't know. But we don't require it, the machine doesn't require it. There is no reason why these people have to be in there.

Mr. Melendez also conceded that you would go up to the first or second floor and if there is loads of garbage stuck up there in the chute you push from the top and you go down. Mr. Rivera told us that. Mr. Diaz told us that. As a matter of fact, Mr. Diaz made it very clear how you do it. You stop the machine, and he said just put the pole in and try to unhook the bridging. If it doesn't unhook, call the boss, the boss will come and then they take some sort of a concrete block from the top, let's say the second floor or the first floor, and force the garbage down, do not put your hand in the machine. In any event, when you put your hand in the machine for any purpose, whether it is to clean it or anything else, Mr. Diaz has made it clear, you throw the switch on the wall and you shut off the switch that's on the machine.

We have also been criticized -- Mr. Shandell apparently seems to suggest, well, the switches aren't marked properly. Maybe Mr. Merced can't see them. Mr. Merced himself has told us where the on/off switch is,and this is

the middle one, and it is difficult on a picture, but you will see the "off" marked to the right and the "on" is to the left. This button over here says reverse. It says it right on it.

You know, you can take the horse to the fountain but you can't make him drink. If they don't want to do it, there is nothing you can do to force them. But all I am saying is if they do get hurt, don't blame us.

Now we will talk for a moment about the safety door. If you remember, Mr. Deutsch told us that there was a door that can operate now manually but before they only had the one fire door. The fire door, according to Melendez and according to other witnesses, this would operate if there's a fire, automatically, shut off the opening from the chute so that if there is a fire in the compacting machine -- you know garbage can burn -- the fire would not go up the chute and then, of course, go to the various apartments. It could also be used for something else, as Melendez conceded. It is not loose but you can push it closed. If you want to go into the machine, you can stop the machine, you can close that fire door and you can go into it and there will be no fear of garbage coming down at you as you are working in the machine.

Just a few words about Mr. Clar, who is the inventor

here.

Years ago perhaps all of you apartment dwellers -- I know I lived in apartments and I know -- we had incinerators in the apartment. Sometimes you could smell the burning soot coming up, sometimes you couldn't, sometimes there would be fires. Well, Mr. Clar, who had years of experience in the Navy, Army, years of engineers' sources, he then got connected with the disposal of garbage and working out compacting type machines on the garbage trucks. There came a time that some acquaintance of his, the owner of some apartment either in Washington, D.C. or in the Maryland area, had a problem. He was very unhappy about the incinerators because they would cause a fire and he would have a fire down in the basement, and he showed it to Mr. Clar and Mr. Clar in his testimony said that interested him, and he sat down and he thought about it: what can we do about a thing like that?

Up until that time, 1965, 1966, there were no such things as compactors in buildings, in apartment buildings. So he decided, with the acceptance of that apartment owner, to figure out how you could work a compactor which he knows works on a garbage truck, how you can work it in an apartment, chute-fed. Chute-fed simply means by gravity. So it does not require expensive and extensive machinery to force the garbage from the top floors down. You rely upon gravity to

come down and fit into the chute. And he devised it. This is the type machine to obviate the problem created by the other means of burning the garbage in the apartment house, the soot it creates, the ecological problems and the hazards of fire: so we have the coming of compactors in apartment buildings, compactors which, incidentally, you have heard today you either have to improve your incinerary methods or you have got to take a compactor in the building, and that is why you heard of patents on this particular method, on this Gobbler, because he was the first, he was the inventor, he was the one that created the machine which sought to eliminate the problem that we previously had with disposal of garbage in apartment buildings.

Now, over the years, and it has been repeated in various items of testimony here, read to you either by deposition or came to you from the stand, there have been no such accidents as we have seen here occurring to Mr. Merced, because in the course of normal events --

MR. SHANDELL: I object to that. There is no proof there have been no other accidents than Mr. Merced.

THE COURT: You may well be right but I will leave this issue like the other facts to the jury.

May I remind you of the time, Mr. Ivone?

MR. IVONE: Yes. I am almost concluded, your Honor.

With respect to this accident, it occurred for only one reason, an amazing disregard of a common, ordinary, basic safety element. You don't put your hand into a moving machine. You just can't do it.

We found that at this very site in this very building there was a minor accident involving Mr. Merced prior. You heard that from the testimony of Mr. Herman, as I read to you, in fact, today from his examination before trial in which the bottles, when they are broken and they come down and they get broken or smashed because of the compactor they get extruded out into the bags. The bags are vinyl and if you had a sharp piece of glass it will cut, and that is what was described to you at the examination before trial where he did, in fact, cut his hand. Now, if you recall the other day, Mr. Merced testified, oh, he had cut his hand sometime ago in operating this machine but he didn't say he cut it that way. He said he cut it because a bottle came flying out of the hopper door.

If you agree, jurors, with my analysis of the case that this accident occurred as a result of the carelessness of Mr. Merced, then I think you will agree also that my client is entitled to a verdict in his favor, and I also would ask you to agree that this machine was designed properly, designed safely, and, as a matter of fact, is operating today without

an interlock.

Thank you.

THE COURT: Miss Stone, ladies and gentlemen, because of the time we'll suspend now until tomorrow morning at ten o'clock. Then you will hear the closing argument on these issues from Mr. Shandell for about a half hour or so and then I will give you the charge, as it is called, or instructions of law which I think will take less than half an hour and then we will submit these issues to you for your resolution tomorrow morning. So we are coming close to your first participation in this case. I will see you tomorrow morning sharply at ten o'clock. Good evening.

(Adjourned to 2/11/75 at 10:00 a.m.)

gw/lf 760

FELIX MERCED

vs. 73 Civil 1621

AUTO PAK et al.

February 11, 1975
10:00 a.m.

(Jury present)

THE COURT: Mr. Shandell.

MR. SHANDELL: May it please the Court, Mr. Ivone, ladies and gentlemen of the jury: this is tne last opportunity that I will have to speak to you on this issue of liability on behalf of my client, Felix Merced.

Mr. Ivone spent some time with you yesterday discussing sympathy and how you were not to allow sympathy to dictate your judgment in this case. Well, Felix doesn't ask for sympathy at your hands. What we are here to ask of you is justice. What we are here to ask of you, because it would be just under the facts as you just heard them and the law that his Honor is going to instruct you in, that you find that the injury done to Felix was as a result of a wrong done to him by the Auto Pak Company, the people who made and distributed that machine we have been talking about.

I hope you will forgive me. I am struggling with a very bad cold and if anybody has some difficulty understanding me, please kindly raise your hand.

gw/lf 761

What you are going to have to do is decide was Felix wronged, did this accident happen because he was compelled to work at an inadequate and dangerous machine, or did this accident happen despite the fact that he was working at a reasonably safe machine, as safe as you could expect any machine with moving parts to be for a workman, and foolishly stuck his hand down into that place where the ram was going back and forth and kept it there for 20 seconds or thereabouts while that ram closed slowly on his hand. Because you remember the testimony that that ram moved very slowly, took about 20 seconds to close. You are going to have to decide how this accident happened, whether it happened that way, as the defendants claim, while Felix was foolishly trying to sweep some glass out of the bottom of that cylinder as this ram closed slowly and inexorably on his hand, or did it happen the way he said, as a result of having to stand by clearing this machine that spat objects from time to time out at you, this machine that, though it was supposed to be automatic in practice, required a workman to stand there and stoke it from time to time to keep it moving. You are going to have to decide these things. You are going to have to decide them on the basis of the weight of the evidence as it has come to you.

How are you going to do that? It isn't easy.

Solomon had some special techniques that are not applicable here. You have to bring your good common sense, your knowledge of life, your knowledge of what seems probable, your knowledge of what seems sensible, your knowledge of what seems reasonable to bear on these questions. That's why you have been chosen. I will discuss some of the evidence with you over the next half hour or 40 minutes.

The first thing I think we ought to discuss is just who it is we have been hearing over the past several days. Well, Felix is suing the manufacturer of this machine, Auto Pak. They, in turn, have sued some other people, the installer of the machine, Universal Thermal, and the building owner, Felix's employer, Southbridge Towers, saying that if they, Auto Pak, are held responsible then they are entitled to some contribution from these other parties who Felix hasn't sued. Therefore, you must understand that if Auto Pak is exonerated in this case, Southbridge Towers is automatically exonerated, they won't have to pay anything, and neither will Universal Thermal. You have to bear that situation in mind when weighing the evidence that came to you from the officers and supervisory people for Southbridge Towers and for Universal Thermal. They are highly interested in the outcome of this case in seeing to it that Felix does not recover from Auto Pak, because if he does, then their

companies are each respectively exposed to recovery over to Auto Pak. You have to bear that in mind when weighing their evidence.

So what is it we are claiming here?

MR. ISAAC: Your Honor, I must respectfully object to that argument. I am not summing up in this case and your Honor has instructed us as to the purpose of this closing argument. I don't think I should be placed in a position where I can't even respond.

THE COURT: Rest assured you are not and I will instruct the jury most specifically that we are not here to consider or argue anything to do about any possible recovery over against one of the third party defendants at this point at all. That is not what we are talking about. So I would ask you, Mr. Shandell, to confine yourself to the issues for the moment. You are quite correct, later on, if need be, we will get to the third party issue, but I don't think it is necessary for you to dwell on that at all.

MR. SHANDELL: I was only discussing it in view of the credibility.

THE COURT: I am not criticizing you. I am merely making a point which is an important one and you know it. Now let's go on.

MR. SHANDELL: Now, what is it that happened here?

The judge is going to instruct you on the obligations of the Auto Pak Company as the manufacturer of this product. How did they fail to meet these obligations?

Well, to start out with, I think it's very plain, established not from Felix or Felix's wife or Felix's friends but out of the mouths of people whose companies are being sued here, that this machine was not automatic.

We started by taking Mr. Nelson's testimony. You remember he was the general manager of that organization. You remember what Mr. Nelson told you. He told you that in deciding how to man this job what the porters' duties should be and how many porters he needed. It was his understanding that a porter could go about whatever cleaning work he had on a particular day and the compactor would work its way automatically. That's what he said. Twenty-four hours a day, that was his understanding and that's how the job was set up. But it wasn't true. It is true that that's the way it was supposed to work. It is true that that's what the manual says. It's true that's what the company represented. But it wasn't true.

Do you have to rely on Felix Merced on that point? You do not. Go right to Mike Herman, the superintendent on the job. What did Mr. Herman tell you? He, too, had some difficulty with the English language. This is what he told

you. I asked him:

"Q Did the representative from Auto Pak tell you that you could turn it off and turn it back on during the day?

"A Yes, he said we can leave this on long time, you know, but we find out later was no good, leave the machine on. We tell the guy, use this only if there's garbage in it, because we find out many times machine was running and the garbage was stuck on top, you know. Was only little piece of paper blocking the eye.

"Q Do I understand, Mr. Herman, that when the representative of Auto Pak came around he said you should leave it turned on a long time and you later gathered from your experience that it was just better to turn it on in the morning, the afternoon and the evening, is that right?

"A Yes."

Mr. Herman again:

"If the garbage doesn't fall down the machine doesn't operate, you know."

My question:

"Q If a porter wasn't there to make sure that the garbage would fall down to the electric eye, then the machine would not operate, is that correct?

"A Yes, sir.

"Q And that is why, Mr. Herman, you decided to run the machine only when a porter was around?

"A That's right.

"Q And did you issue the porters sticks in connection with their operation of the electric eye?

"A Yes."

So we find when the customer got this supposedly automatic machine he found out you couldn't leave it alone, you had to tend it, you had to leave a porter there all the time, the porter had to be around to stick a stick in there to unjam the jams and bring the stuff down, and unless you were going to have three porters in eight-hour shifts standing there all day at the compactor, what you had to do is turn the compactor on and off. Otherwise you would need three porters just to stand there by the compactor in case a piece came down.

Of course, that only made things worse. Mr. Danziger. Mr. Ivone was questioning him.

"Q As a matter of fact, Mr. Danziger, is it the better practice to leave this automatic machine on all the time?

"A Yes.

"Q If a machine is left on all the time, Mr. Danziger, would it be correct to say that it would not

be necessary to hasten the garbage down?

"A It would be less, much less necessary. You would eliminate most of the problem."

So what do we find here? We find here a machine that bridges, a machine that creates jam-ups and, therefore, requires a porter to be around all the time to break up these jam-ups, and if you don't want to have three porters per machine, eight hours a day apiece for 24 hours a day, seven days a week just standing there, then you have to turn the machine on and off and then it gets much worse. We don't have to rely on Mr. Danziger for that point.

Mr. Deutsch told you that. He had this ratio where you have things pressing down, it also squeezes them out, it tends to jam against the sides.

So now you have got a porter, and Mr. Melendez explained that to you, who now has to stand there the whole time that he is working and keep stoking this thing so that the bags would keep dropping down. This is the machine these people sold as automatic.

Mr. Danziger:

"The cause of that, is it called bridging?

"A If it happens by bridging, it's called bridging.

"Q Are there other causes of it?

"A Just a big object being thrown in or a malfunction of the machine, the machine ram doesn't operate or it can just keep building up."

You remember I asked Mr. Deutsch whether this could happen with the machine on constantly just by a buildup and he said no, that couldn't happen, but here is Mr. Danziger, the installer of this machine, as well as Mr. Herman, the man who had to worry with working the machine, and both of them told you it had a tendency to build up and created jams that had to be broken up.

"And if it shuts off, did you experience that the trash or garbage that came down a compactor such as this would cause arching or bridging of the garbage?

"A Yes."

What kind of automatic machine is this? You heard Mr. Aaronson tell you that a machine like this with this elbow effect where they had to cut down the force of gravity by creating this angle -- by the way, you remember Mr. Danziger telling you that made things much worse with jam-ups and bridging -- creating this angle, reducing the force of gravity, that if you wanted the machine to be automatic you would have to have some kind of positive feed, rollers, screws, something to break up, to move this garbage

along, otherwise it is going to jam.

Does that violate your common sense? Isn't that exactly what you would expect to happen in a thing like that? Did you ever try to push bags of garbage off a table?

And imagine what happens in a situation like this, if a piece of wood, a bag of bottles, a paint can gets caught up in that machine and the machine goes and hits it, backs off, hits it and backs off, hits it and backs off. Imagine what is going on on top of that. Imagine the mess being created now. And yet that's the way this machine works. It's supposed to be a compactor. It was supposed to compress this garbage. That's what they sold it for. That's what everybody thought it was supposed to do. And the uncontradicted testimony in this case is it is not a compactor at all, it is just a bag packer. It transfers the garbage through a tube into a bag. That's all it does.

Here is a picture of it. It's just loose newspapers. When somebody called this a compactor, didn't you get an idea what the big machines do to a car, squeeze it down into a little ball? It is just a bag packer. No wonder they had so much trouble with it. The reason it is just a bag packer is there is no resistance on the other side, it is just squeezing it into a bag. If the bag is packed too full it will burst. That is another reason they have to have

a porter constantly there. They have to constantly keep changing these bags. Of course, here again it is a non-automatic machine, a machine you have to have an attendant and unless you want the attendant there 24 hours a day, garbage will build up when you turn it off and you are going to have to have somebody stoking it to bring it down.

Did Clar know all of this? Danziger says he did.

"Did you ever communicate with Mr. Clar that in your experience the people who were using this compactor under the chute were experiencing bridging problems that required them sometimes to open the hopper door and hit the garbage with a stick or poker?

"A I don't know if I had to tell them."

He was quite aware of it all the time.

"Q Did he communicate this to you?

"A Yes.

"Q Did he ever recommend to you any means of coping with this problem?

"Q Not that I know of."

Wasn't that his very duty? Wasn't that his very duty? But if you read Mr. Clar, none of this ever happened.

"Did you ever have any bridging problems," we asked Mr. Clar on his deposition.

He said, "In the early stages of the machines, when we had sloping walls, we had some problems because the stuff would come to the narrow or slope part and wouldn't come through, but after I made the walls straight we never had a bridging problem at all."

Do you believe that testimony after what you heard Mr. Herman and Mr. Danziger tell you? This man was utterly unconcerned with the way his machine was working, utterly unconcerned. Wasn't that his obligation to be concerned?

You know, his Honor is going to talk to you about the law, and one of the things is negligence. If you are going to make a machine, don't you have to test it, test it enough to find out how it works, do field testing, put it out in apartment buildings and watch it, see what happens, see what the poor porters have to do? Do you remember what Mr. Clar said in his deposition? He never threw a piece of wood, he never threw a bottle, he never threw a paint can down a chute to see what would happen. He never knew and can't tell us even to this day how much per hour the capacity of that machine is, how much garbage can it toss off. He just doesn't know. He never tried to find out.

I asked him at the deposition repeatedly, "Mr. Clar, did you make records when you observed this machine

"In operation in your friend's apartment in Maryland?"

He said, "Sure did. Made records of this, made records of this, that, the other thing."

Where are they? It must be in five places in this deposition. I won't bother reading it to you: "Those records are in Red Lion, those records are in Red Lion." What records are in Red Lion? There are no records in Red Lion. There are no records because he never did any tests. He never made any observations. He knew he had a hydraulic thing that could squeeze garbage out through a snout into a bag. That's all he cared about. How it worked, whether people were endangered by it, he couldn't have cared less.

"What safety considerations," I asked Mr. Clark, "did you take into account when you tried to build this machine?"

He said, "I worried that we complied with the electrical codes and the hydraulic codes."

"Any other safety considerations?

"No.

"Q Did you consider any safety codes with reference to machinery with moving parts?

"A No.

"Had you ever seen an interlock in operation before you designed this machine, Mr. Clar?

"No."

It is right in here. How does a man design a machine and doesn't know what an interlock is? Doesn't try to find out, doesn't consult a safety engineer. Go to one, go over to the university.

"I have got this machine, I think it's a great idea, I have invented it. Do you see any bugs in it? Do you see any safety problems?"

That's all you have to do.

MR. IVONE: I will object to counsel's remarks he had never seen an interlock in operation --

THE COURT: I can't hear you.

MR. IVONE: -- when it is specifically mentioned in his examination before trial on page 48 --

"Have you ever seen an interlock work on a door to a machine?"

The answer appears on 49 --

"Q Yes, I have seen an interlock on a door."

MR. SHANDELL: Let me read to you, then, in view of Mr. Ivone's objection.

MR. IVONE: Page 48, line 5 it starts.

THE COURT: Two things. May I call to your attention the time and, second of all, may I call your attention to the fact that whatever may have been read, the jury

will decide, and I am sure you have other arguments.

MR. SHANDELL: I certainly do, your Honor.

THE COURT: Let's go ahead.

MR. SHANDELL: Mr. Ivone took an hour in summation and I barely used twenty minutes.

THE COURT: I am not cutting you off. I am making the point which is an obvious one. Again, I am not trying to argue with you. Please keep in mind my simple advise, which I think you can understand.

MR. SHANDELL: I certainly will, sir.

THE COURT: Let's go ahead.

MR. SHANDELL: I want to read from page 49, line 20, just the next page of that deposition.

"Yes, I have seen an interlock on a door.

"Q Prior to the mid 60s when you designed the Gobbler, had you ever seen an interlock in operation?

"A No.

"Q On any kind of machine?

"A I don't believe so."

Now maybe he knows, but he certainly didn't know when he designed this machine.

You know, his Honor is going to talk to you about breach of warranty. In that connection, I want to recall to

your minds something not that any witness I called said but the expert witness called by Auto Pak, what he said. After he got through saying what a good, safe, wonderful machine this was, I asked him, "I want you to assume, sir," -- and I got Mr.Herman's testimony out -- "I want you to assume, sir" -- word for word I read it from Mr. Herman's testimony -- "that if a porter wasn't around to make sure the garbage would fall down to the electric eye then the machine would not operate. I want you to assume that that's what that machine was about."

Right out of what Mr. Herman said the machine was about, not any witness friend of Mr. Merced's but he is the supervisor on the job there, right out of Mr. Herman's testimony. I asked him to assume that those were the facts. I said, "Now what have you got to say about that machine?"

He said -- you remember it -- he said, "If that's the way the machine worked, then they should have gotten their money back."

You think about that answer that was given to you by the expert witness for the Auto Pak Company. You think about that answer in connection with his Honor's instructions on breach of warranty because that's exactly right. They should have gotten their money back because this machine didn't work the way Harry Nelson told you he

assumed it worked. It worked the way Mr. Melendez told you it worked. You had to stand there with a door open all the time and keep poking or else you got nowhere.

I asked Mr. Deutsch, I said, "When you are saying this is such a safe, wonderful machine, do you base your opinion on the fact that this was an automatic machine that worked without manual assistance, with the door closed, and all you had to do is let it work?"

He said, "Yes," in part, but that's not what the machine was like. That you got from all the witnesses in this case. The machine wasn't like that. The machine was a machine that exposed a person to danger because he had to have the hopper door open and he had to keep poking to get the garbage down.

And such a machine, regarding guarding and safety devices to protect the workmen from the moving parts, we talked about standards. We talked about them with Mr. Aaronson and with Mr. Deutsch. You have learned, I am sure, that back in 1970 nobody had gotten around to writing a standard directed specifically to compactors. There was a waste disposer standard that said, in substance, that the specifics of interlocks and other guarding devices are not specified but they shall be considered in designing the machine depending upon the kind of exposure there is. I ask you, did Mr.

Clar ever consider an interlock? He had never seen one in operation. He had never gone to look at one. Did he ever consider the kind of exposure the workmen who had to work on this machine were exposed to? Apparently never. And yet that's what that safety code that was then in existence said you had to do, depending on the kind of waste disposer you had, you had to consider what kind of protection was necessary, including interlocks.

And although the Labor Board in New York had never gotten around to writing a safety standard specifically for compactors, there were other grinding machines that had requirements for interlocks --

MR. IVONE: I object. The Court specifically ruled out anything pertaining to grinding machines whether they required interlocks or not.

THE COURT: I am sure that whatever I ruled, the real question is is there any evidence at all to support either of your positions. I will leave it to the jury. Now let's move on.

MR. SHANDELL: Mr. Aaronson told you that basic engineering principles in the design of a machine such as this required these safety devices, including an interlock. And Mr. Deutsch said no, they didn't, but his opinion was based upon the fact that this was an automatic machine that didn't

have to be manually stoked by the operator. Because he said if the machine worked the way Mr. Herman found it worked, then they should have gotten their money back.

How did this accident happen? The defense would have you believe that -- one more thing about standards before I go into that --

THE COURT: Mr. Shandell, may I suggest to you, forgive me for interrupting, again I don't mean to argue, but it is very difficult for me to hear. My hearing is quite acute. I doubt if all the jury can hear you.

MR. SHANDELL: Is anybody having trouble? I know I have a terrible cold.

THE COURT: Never mind asking questions. Just keep your voice up.

MR. SHANDELL: All right.

How did this accident happen? The defense would have you believe that Felix Merced stuck his hand into this machine without turning it off, which he could have done, reached down into that -- I don't know what to call it, a cockpit, a hole, the place the ram closes across, to clear out some glass, broken pieces of glass down in that hole, to clean them out with the machine on and kept doing that as that ram kept approaching his hand until it closed on it and severed it. If he did that, I assure you if he did that,

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Mrs. Stone, that is the most foolish man I have ever seen in my whole life and I doubt anybody could devise a protection against that. Of course, an interlock would have kept him from having his arm off in that regard, but I don't think anybody would be required to foresee that a man would do as foolish a thing as that. I think it is plain lunacy. I don't believe it happened, I don't see how it could have happened, I don't see how anybody with a modicum of intelligence, etc., and you watched that man for half a day here and you certainly know he is a reasonably intelligent human being with a good grasp of the world around him, and you certainly don't expect that he really did that, he reached down into that machine where the ram was coming and let his arm stay there long enough to cut his hand off. Twenty seconds. Just time twenty seconds and see how long it is. It is an eternity. He could have gotten his arm out in less than a second, at the very last second, no problem at all. He tells you, "It wasn't my fault my arm got down there, it wasn't. I was doing my job trying to clear the jam-ups that were happening in this machine. There was a piece of wood and I had to get it out and if I had gone to turn off the machine to get the piece of wood out, by the time I got back the wood might have cleared and might have gone into that ram and then I would have that thing banging

there and maybe break and I was told not to allow that to happen."

By the way, did Mr. Nelson come back to court to deny that conversation? Did he? He could have, you know. He is just around the corner.

"I was told not to allow that to happen. So I reached not down into the ram, it would be crazy to do a thing like that, I reached up here to get the piece of wood out when something happened. A bottle came spitting out of that thing and struck me in the head and I was dazed and I fell forward and garbage then fell down on my arm and trapped me in there, and dazed and trapped the way I was my arm got cut off.

That's the way he says the accident happened. You have to weigh that. You have to weigh that. You have to ask yourself is it reasonable, is it reasonable for me to conclude that this man stuck his arm down into that hole there and started cleaning glass out without turning the machine off? My God, why should he do a thing like that? Or was he doing his job the way they had always done, standing there with the stick -- even with the stick you have to reach your hand in there. They say no, the stick was a substitute for the hand. You see that diagram. You see how long it is to the back of that thing. You see how short this

stick is. Even with the stick you have to reach your hands in there. So he was used to doing this. This was the job. He was lulled this was always the job. This is what his employers required of him. So instead of reaching for the stuck wood with the stick, how do you pluk a bottle or a stuck piece of wood or a piece of cardboard out of there with a stick? You can't. You have to use your hand. And so he reached for the wood and then he got hit with a bottle because this machine, on top of all its other faults, was a potential spitting machine like a machine gun. Mr. Herman told you that and Mr. Danziger told you that. If a thing landed on that deflection plate it could bounce right up at you. That's how horrible the machine is. Imagine if you had to stand at a lathe with a burning bush saw and every once in a while something would pop up at your head from that machine. Is that a safe machine? That's the craziest machine I ever heard of.

Let's deal with the prior statements before we go on to something else. Mr. Ivone spent a long time reading this statement that Mr. Herman made up soon after the accident happened for the lawyers for Southbridge Towers. And by the way, that's what he said when I asked him, that this statement is one he gave to the lawyers for Southbridge Towers, and Mr. Isaac got up and made a big fuss about it. He said, "I doubt

"it. I don't believe such a thing happened."

You never heard any more about that since, not one word of proof that he didn't give it to the lawyers for Southbridge Towers. This careful statement, taken by the lawyers for Southbridge statement, for their purposes in this case in order to find out in vast detail what it was --

MR. IVONE: I must object to counsel saying Southbridge lawyers took a statement for their purposes in this case when he knows the employee cannot sue an employer, your Honor.

THE COURT: That may be argument and maybe the jury will find he didn't, he isn't correct factually in his argument. So once again, gentlemen, I want the jury to decide these factual matters as they are entitled to do it. Let's move along.

MR. SHANDELL: This detailed statement taken by the lawyers for Southbridge Towers in careful, complete and explicit detail, what does it say? Does it say anything about Mr. Merced cleaning pieces of glass out from under the ram? It certainly does not. It doesn't say anything of the sort. It says, in a statement reported by a man who speaks poor English, having been taken from a man who speaks badly broken English about what the man who speaks badly broken English told the man who speaks poor English with

another dialect altogether in a hospital while the guy was in pain, what does it say? It says that Felix told him that he was trying to get a stuck bottle out of the machine.

Well, I don't know the difference between "bottle" and "board" as he might have heard from Felix in the hospital when one speaks with one kind of accent and the other speaks with another kind of accent, but you understand how close that really is to what Felix is telling you now, how in all of the little bit that he says you have got the entire gist of what Felix says happened. You have the bottle and you have got the thing that was stuck, and how much broken English Mike Herman could grasp in the hospital that day, you have got to doubt very much. But you have the "stuck" and you have the "bottle" and nothing about anybody cleaning any glass.

And the statement tells us one more thing, a very important thing, because the defendant, Auto Pak, and the employer, Southbridge Towers, went to pain and effort to bring in some people from the building, supervising people, who were to testify about Felix's instructions.

Now, you remember Mr. Rivera, the first witness. The first witness, Mr. Rivera, said they were told that if anything happened to "turn off the machine and report to us." They were not to put their hand or any object in the machine.

That's what they were told.

I asked him, "Did that include a stick?"

He said, "Yes, that includes a stick."

"Didn't they ever use sticks?"

"No, sometimes they got them on their own."

"Weren't they issued sticks?"

"No, they weren't issued sticks."

We know what Mr. Herman told us. They were issued sticks. We know what Mr. Diaz told us, they were issued sticks. Why are they telling this story? Why did they cook up this story?

Then you have to know one thing about witnesses coming to court. The lawyer who puts a witness on the stand without knowing pretty much what he is going to say is an idiot, and none of these lawyers are idiots. You put a witness on the stand, he says, "Who are you?"

"I'm Rivera."

"What are you going to say about this accident?"

"I will tell you."

You have no idea what he is going to say? What foolishness. What kind of lawyer would that be? It is perfectly appropriate for a lawyer to talk to a witness to find out what evidence he has to give before he puts him on the stand. Otherwise, how could you present a case.

And so when Mr. Rivera stood there and denied over and over and over again that he ever talked to any of the lawyers or any of their assistants in this case and that his testimony was something that none of these people had ever heard before, no, I hesitate to call anybody a liar, but there is only one inference you can draw about testimony like that, that he ever talked to the lawyers before going on the stand.

You know why he was saying that? He was saying it because he felt so guilty about the way they cooked up his evidence before he got on the stand.

Which brings us to Mr. Diaz. Mr. Diaz has already been told out in the hall right after court that Thursday about what had happened. So he was well prepared to say yes, he talked to all the lawyers and their assistants except Mr. Ivone, who he hadn't talked to, but he talked to Mr. Ivone's assistant, and yes, he discussed what he was going to do and he discussed the case with them, which is perfectly proper and appropriate. I would do the same thing. How could you put a witness on the stand without knowing what he was going to say?

Now, what did he say, Mr. Diaz? What did he say? He testified they were instructed to have a stick and they were issued a stick but they were told to turn the

machine off before using the stick. Let's examine that for a minute. Because Felix says he wasn't given any instructions at all, all he got was what he got from his fellow porters and by watching.

If somebody was given instructions about how to handle dangerous machinery, don't you believe sometime or other they would have reduced it to writing? There were plenty of people there who could write out notices in Spanish. Don't you think it would have been reduced to writing if somebody was concerned about issuing instructions and warning about a machine? You have never seen a writing about any instructions in this case. Consider that. Also consider what Mr. Diaz says the instructions were: turn off the machine before you put your stick into it.

I turn to Mr. Herman, the boss on the job, after all.

"Did you have porters standing there all the time the machine was running?"

"Late we find out if porters stay there and watch machines, shut it off as soon as it is empty."

"Did you ever see porters standing there with the machine going with their sticks in the hopper door pushing the garbage down?"

With the machine going.

"Yeah."

"Did you ever tell them not to do that?

"A No."

Where are these instructions they are to shut the machine off before they work with their sticks?

"Did you ever tell them not to do that, Mr. Herman?"

"No."

Mr. Herman was on the stand first thing in this case before anybody got a chance to discuss testimony with anybody.

"Q When you saw the men cleaning the machine with the sticks or clearing the machine with the sticks while the machines were operating, did you then at that time instruct the men to turn the machine off?

"A No, I don't."

Where are all these instructions not to put your stick in the machine? Why did they cook that up?

Now, remember the last question I asked Manny Diaz. I said, "If you are up there with a stick and you are knocking out a stuck piece of garbage and the garbage comes down, doesn't it happen that the next piece of garbage down sticks again?"

He said, "Sometimes it does."

"So if you had to go and run and turn the machine off each time a bag came down and the next one got stuck, it could take you five hours to clean that machine out, couldn't it?"

Then he said, "Yeah."

Then he realized what he said. So I sat down. Testimony that comes out quick, voluntarily, that's where you find out the truth.

Yes,, if you had to turn the machine off every time a piece of garbage got stuck and you had to put the stick in, you could never get that work done in an hour and a half.

So I say to you, the statement, not one word in here about he was supposed to turn the machine off before he unstuck things, not one word in here.

"Felix was also supplied a stick. I have no idea why he did not use this stick to take out the bottle."

Ask yourselves, how could you get out a bottle with this stick or a board? But not one word, "I have no idea why he didn't turn the machine off before he took out the bottle."

Because that's not what occurred to Mike Herman. Mike Herman knew damn well they weren't turning the machine off and they couldn't turn the machine off and do their work. He knew and it never occurred to him to say, "It's all

"Felix's fault. He should have turned the machine off."

He said, "It's Felix's fault, he should have used the stick."

Read that statement.

You can read in that statement all of Mike Herman's knowledge that Felix was not supposed to turn the machine off before clearing out blockages for the very reason that he told you, that by the time he got the machine turned off and came back, something else would have happened. And, as Mr. Melendez told you, they all stood there with the hopper door open cleaning blockages, and as Mr. Deutsch told you, if that is the way the machine worked, Southbridge should have gotten their money back. It is a horribly dangerous machine. It didn't work the way it was supposed to. It didn't compact, it didn't work automatically, blockages had to be cleared, it exposed the operator to danger, it couldn't work continuously, it had to be manned. A horribly dangerous machine.

And because it's a horribly dangerous machine, Felix Merced was hurt at it, Felix Merced was hurt at it.

Now, Mr. Ivone says, "It's Felix's own fault. He shouldn't have reached in there."

Where are the warnings that go with this machine? Why aren't there warnings to bring to the attention of the

workmen what the dangers are? Don't we have to be reminded of dangers from time to time? Why did they write a whole brochure and it did not contain one warning about this and did not contain one bit of instruction about blockages? Because they couldn't care less. They were selling their machines until they went out of business. Was it really Felix's fault? He has got to do his job. His employer gives him a job. He's got to get it done. He's got to finish. He has got to get it ready for the sanitation truck at 9:30. You heard Mr. Diaz tell you that. The machine should have worked automatically and he wouldn't have to do all those things but it didn't. So he had to get his work done tending the machine. And he did even as you or I, as anybody would do. After all, we have all come within a couple of feet of moving parts. We turn on motors and watch them run to look to see what happens. With a motor running we pick off the top of carburetors. We do all kinds of things like that. He didn't put his hand in the fan. He put his hand on the carburetor and tried to take the top off, but something came spitting out and hit him on the head and he fell into the fan. That something that came spitting out on him is another defect in this machine. They never, never, never designed this machine with any kind of cover so that you could open the hopper door without something pouring

down on him. Whatever cover is something that was put in by somebody else. What was there when Felix had his accident was a fire door, it worked with springs. Now they have this manual door with a handle. Ask yourself why. None of these safety precautions were ever considered by Auto Pak. Felix was exposed to a machine that he had to work to get his work done and it is because things will happen that safety precautions are required and they weren't provided.

Thank you very much.

I have been conscious of the time, the attention you have spent in listening to this case. I appreciate the time and attention you have given us. I must say to you that I am a great believer in the wisdom of juries. Whatever your decision will be, I will be satisfied justice has been done in this case and Felix has had his day in court. Thank you very much.

THE CLERK: The Court will now charge the jury. Any spectator wishing to leave the courtroom, may do so now. Will the marshal please lock the door.

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FELIX MERCED and MODESTA MERCED,

Plaintiffs,

versus 73 Civil 1621 HRT

AUTO PAK COMPANY, INC. et al.,

Defendants

New York, N. Y.

February 11, 1975

CHARGE OF THE COURT

THE COURT: (Tyler, D. J.) Miss Stone and ladies and gentlemen:

As you approach this important task of citizenship, please remember that it is your duty to decide this case without prejudice or sympathy for or against Felix Merced or the defendant Auto Pak Company.

Before I get into the law which will govern your deliberations, I think it wise for me to emphasize again what we are putting to you at this point in our trial to decide.

As you have been told by me twice, and as you know, I am sure, we have really two lawsuits here. First, we have the so-called primary case which Mr. Merced brought against Auto Pak Company and the Auto Pak Division of Flinchborough

Products, which in turn is supposed to be a division of Gulf & Western. For our purposes, incidentally, I think you can treat those two described or named entities as one and the same: Auto Pak.

Now, there were certain other defendants who have been dropped from the case by either the plaintiff on his own motion or by previous orders of the Court. That means, in other words, that we are putting to you now the question of whether or not you find the defendant Auto Pak to be liable to Felix Merced for the injury which he sustained on the morning of July 13, 1972, in Building No. 7 in the Southbridge complex just to the south of where we sit right at this moment.

We will not be concerned, and you will not be concerned, at this point, at least, with the so-called third-party case, that is, the case which you know Auto Pak in turn brought against the installer, Universal, and also against Southbridge itself as the employer of Felix Merced. We will put those third-party cases, so to speak, to one side for the moment. You will not be concerned with those cases in th this moment about any issues which might come up in the third-part cases. I am only going to instruct you now in respect to the claim

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of Felix Merced that Auto Pak was guilty of negligent manufacture or design of the machine in question, and his alternative theory, that Auto Pak breached an implied warranty of fitness of this Gobbler-16 machine for use, obviously for use as a compactor of garbage in an apartment building such as Number 7.

Now, before I get to the issues and the rules of law which will or may be applicable to your deliberations on the main case of liability, let me take up some other matters which nevertheless are very important.

First of all, you and you alone, not the lawyers, not the Judge or anybody else, are the sole arbiters of the credibility of witnesses who appeared here and testified in our trial. At least as I recall the testimony, there are considerable conflicts between witnesses as to certain facts.

Now, under our system, you should carefully scrutinize the testimony given by each witness who appeared here, the circumstances under which each witness has testified and every matter and piece of evidence which tends to indicate whether or not the witness is worthy of belief.

In that regard, of course, you should consider each witness' intelligence, his demeanor as he sat here and gave

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his evidence. Consider also any motive or reason the witness might have to lie or obfuscate the truth. Consider any relationship which a witness might have to one party or another in the case. Consider the strength or weakness of recollection of past events and conversations of a witness.

Now, consider also, of course, the extent to which a witness is either corroborated or contradicted by other evidence in this case, that is to say, evidence of another witness or documentary evidence in the case. These and similar criteria which you would use to size up or evaluate any person with whom you were doing business in your daily lives would be the kind of criteria to use to perform this important function of yours to decide to what extent to believe the particular witness and what weight his or her evidence deserves.

Indeed, under our system, you are entitled to accept or reject, wholly or in part, the testimony of any witness who appeared here, depending upon how you assess his or her credibility.

Now, while I am talking about witnesses and credibility, I want to talk about a special kind of witness. That is what lawyers frequently call an expert witness.

We had several persons who were called here as

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experts. I recall Mr. Aaronson, I think his name was, who was called for Mr. Merced, and he gave certain opinions about the operation of machinery and most particularly a compactor and garbage machines such as the Gobbler-16.

Similarly, as I recall it, the defense called a man named Deutsch, who gave us his qualifications, as did Aaronson, and was asked to give his opinion.

Normally, as I think you all know, the rules of evidence in cases of this type do not permit a witness to testify as to his opinion. A so-called expert witness is an exception to this general rule. An expert witness is really nothing more than a person who has become expert in a given profession, and he is therefore permitted to state his opinions as to matters in which he is presumably versed and which are material to the issues in the case. He may also state his bases or reasons for his opinion evidence.

Nevertheless, ladies and gentlemen, just because these men are called experts does not mean that you are obliged to accept their opinions or follow their views. Quite to the contrary, you are entitled to accept or reject the opinion evidence given by any expert witness, depending upon how you assess his statements and opinions and the reasons which he gave therefor.

Now, as I am sure counsel know, the burden is on the plaintiff in a civil action of this kind to prove every essential element of his claims or contentions by a preponderance of the evidence. If the proof should fail to establish an essential element of plaintiff's claim by a preponderance of the evidence. If the proof should fail to establish an essential element of plaintiff's claim by a preponderance of the evidence, then you would be obliged to find for the defendant Auto Pak.

What does the law mean by this concept: preponderance of the evidence? It is really quite simple. It simply means to prove that something is more likely so than not so. Put differently, ladies and gentlemen of the jury, a preponderance of the evidence in the case means such evidence as, when considered and compared with the opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

I would call to your attention at this point that in the course of my remarks in instructing you about negligence law and warranty law I will be using a phrase "proximately caused by" or "the proximate cause of". I want to instruct you what that phraseology means. It is or may be important depending upon how you assess the facts in the

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case.

Under the law here applicable, ladies and gentlemen, an injury or accident is proximately caused by an act or omission to act whenever it appears that that act or omission played a substantial part in bringing about or actually causing the injury or accident complained of and it further appears that the injury or accident was either a direct result or a reasonably probable consequence of either the act or omission.

Now, let me emphasize to you that this designation does not mean that the law recognizes only one proximate cause of an injury or an accident consisting of only one factor or course of action or thing or the conduct of only one person. Obviously, the law does not draw that irrational or impractical conclusion about the matter. On the contrary, the law recognizes that many factors or several factors or things or the conduct of two or more persons may operate at the same time, either independently or perhaps together, to cause an injury, and in such a case each may be said under the law to be a proximate cause of the accident complained of.

Now, I told you several times this morning, and I repeat again, that Mr. Merced has two alternative theories of liability on the part of the Auto Pak Company. First,

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his theory is that Auto Pak negligently manufactured or designed, or both, the Gobbler-16 which happened to be installed in Building Number 7 at Southbridge Towers. Alternatively, his theory is what lawyers or the law call breach of an implied warranty of fitness of the machine to be used as a garbage machine or compactor.

I am going to instruct you about the elements of the law of negligence and the elements of the law of warranty, and I am going to discuss those elements or rules so that you will understand them, and, depending upon how you assess the facts, one or more of these principles may become important in our deliberations.

Now, when we use the word "negligence" here, negligence is to be defined under the law applicable to this controversy very simply as the failure to use ordinary care or the care which a reasonable person would exercise in order to avoid injury to himself or to others.

In respect to his claim of negligence against Auto Pak, plaintiff has the burden of proving by a preponderance of the evidence the following:

First, that he himself was not negligent in any respect on the morning of July 13, 1972, which is the day, as I understand the evidence, when he suffered his accident at Southbridge Towers.

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Second, he must prove by a preponderance of the evidence that this machine was negligently designed or manufactured by Auto Pak Company.

Third, he must prove by a preponderance of the evidence that if the machine was negligently manufactured or designed, that negligent manufacture or design proximately caused his accident.

Now, this brings up a point which you know has really been argued, quite understandably, both by Mr. Ivone for Auto Pak and Mr. Shandell for Felix Merced, and that is what is sometimes called by lawyers contributory negligence.

I have already told you that the plaintiff must prove, in order to recover here, that he was free of negligence in the operation of this machine on the day in question. That is sometimes called contributory negligence. I will define it for you, although in effect I think I virtually have, but let me repeat that if you find that the plaintiff failed on the day in question to exercise that degree of care for his own safety that a reasonably prudent person would have exercised under the same circumstances, then you will be obliged to find for the defendant Auto Pak on the issue of liability.

I turn now to the principles of law which pertain to the contention that the Auto Pak Company was guilty of

negligent manufacture or design.

I instruct you that one who puts out as his own product an article which is manufactured for him by another firm or concern is subject to the same liability as though he or the company were the actual manufacturer.

Now, that principle is applicable here, at least as I recall the evidence. That evidence was to the effect that though Auto Pak designed the Gobbler, essentially it caused another concern, AMF, to manufacture, the Gobbler-16 for its account.

Now, as Auto Pak counsel knows, under the law, it is no defense here -- and Auto Pak does not raise it as a defense -- that the actual manufacturer was AMF. Keep that principle in mind. There is no issue about it. But I point out to you that is the fact, and that is the law.

I also instruct you that in this area, plaintiff, it is true, is not technically or actually required to prove the actual specific defect which caused the accident, if such defect you were to find. However, in this case, as you know, Merced contends and claims that he has proved that this machine was negligently manufactured and designed in several particulars.

As I understand Merced, most importantly, he claims that this particular Gobbler-16 was defectively

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designed, in that there was no interlock device or device on the hopper door of this machine; put differently, that there was no device which would break the circuit in such a way so that when one opened the door it would automatically cut off the operationof the machine itself.

I am not so clear exactly on the details of the other specific claims of the plaintiff. Suffice it for me to say now that I understand him to have contended, at least at the outset, and perhaps he still does, that there was defective design of the chute.

I think, as I recall Aaronson, he offered the opinion that the chute should have had no bend in it as it fed into the machine itself and, rather, that the chute should have been absolutely on the vertical in order to avoid so-called bridging or blockages of peculiar objects thrown into the chute by the tenants of Building Number 7.

I believe also it is fair to say that the plaintiff contends that there was no warning of the dangers of operation of this machine for a person such as a porter or handyman or another person who would be operating.

In any event, as you know, a great deal of the case has hinged upon these matters as contended by Merced and you also know that the Auto Pak people have stoutly argued that there is absolutely nothing wrong with the

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machine, that there was no requirement for interlocks by statute or regulation and that, as a matter of fact, there is not even any requirement in sound engineering practices, at least in the year 1970, when this particular machine was put on the market.

Those are arguments which you will have to resolve as you assess the evidence.

Now, under the law, a manufacturer such as Auto Pak does not guarantee that his product is incapable of doing harm. The law does not require that a manufacturer or concern such as Auto Pak produce a product which is accident-proof or that the manufacturer guard against injury to others from a danger which is obvious or is discoverable by reasonable inspection or that that manufacturer supply safety devices to guard against such dangers which are easily discernible or discoverable. All that the law here applicable requires, ladies and gentlemen of the jury, is that the manufacturer produce an article or machine which will function properly for thepurpose for which it was intended and that the machine be free from hidden defects or concealed dangers or imperfections.

Also under the law applicable in this case, I instruct you that, assuming that safety devices are available for use on a machine or are used by other manufacturers

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of similar machines does not, absent a statute or law requiring use of such devices, impose, without more, liability on the manufacturer when and where the danger to be avoided is open and obvious to any prudent person or user.

Now, as you know and as I mentioned a moment ago, one of the contentions Mr. Merced has made is that Auto Pak breached a duty to warn a user, such as Mr. Merced of the Gobbler-16, of the dangers which were inherent and were not visible to any prudent inspection.

Under the law, a manufacturer of a machine such as this is under no duby to warn of obvious dangers in the use of its machine, that is to say, dangers that are obvious or discoverable upon reasonable inspection. However, if there is a danger in usage of the machine which is not obvious or discoverable on reasonable inspection, then the law imposes upon the manufacturer the duty to give a reasonably adequate warning of the danger to a user or consumer.

In other words, ladies and gentlemen, it is up to you to decide whether or not the circumstances are such here that the dangers of use of this machine were not open and obvious. If they were not, then you could determine that Auto Pak breached its duty to warn adequately of the dangers you so find.

If, on the other hand, you determine that the

dangers of putting one's hand or a portion of his body into the machine with the machine running are open and obvious, then you would be entitled to find that there is absolutely no duty to warn at all.

In short, as in all these issues, it is strictly up to you to decide.

Now I turn to the alternative theory of Mr. Merced, a breach of implied warranty. You will notice, I am almost certain, that a great deal of what I say about the rules of law seem to be very similar or close to the rules of law applicable to negligence. If you do decide that, I would not blame you. They do sound a great deal alike. However, there are distinctions. So I ask you to be patient with me as I go through the law here.

Let me read to you the principle, or the general principle of law which is applicable here.

When a manufacturer places upon the market a product which is of such a character that when it is used for the purpose for which it is made, it is likely, if defectively made, to be a source of danger, then the law implies a warranty by the manufacturer to any person which the manufacturer reasonably should foresee might use the product, and that warranty is to the effect that the product is reasonably fit for the ordinary purpose for which it is

intended and used.

If the product or machine is in fact defective and not reasonably fit to be used for its ordinary purpose, then the manufacturer is liable to any person properly using the product for injury resulting from its defective and unfit condition.

Thus, if you find that Auto Pak's machine was being used by Merced for its ordinary purpose, that it was defective and unfit for use for that purpose, that the defective and unfit condition existed when the product or machine was put on the market in 1970 and that its condition was a substantial factor in causing injury to Merced, then your verdict will be for the plaintiff on this claim of breach of implied warranty.

If, however, you determine that the machine was not being used by plaintiff for its ordinary purpose or that it was not defective or unfit for that purpose at the time Auto Pak put it on the market in 1970 or that though it was, its condition was not a substantial factor in causing Merced's injury, then, of course, your verdict will be for Auto Pak.

Now, to summarize here, in order to establish his claim of breach of implied warranty of fitness for use of this machine, Merced must prove, first, by a proponderance

of the evidence that on the day in question he himself did not misuse the machine or operate it in an unreasonable fashion; second, he must establish that when the machine was placed on the market by Auto Pak in 1970 it was defectively made and thus a source of danger to a person such as Merced, who would be likely to use it; and, finally, of course, you would have to be satisfied by a preponderance of the evidence that if there was such a defect and source of danger in the machine when it was placed on the market, that that defect proximately caused Merced's injury.

Now I come to the end of my remarks. When you retire, we are going to ask you to determine whether you find for the plaintiff or for the defendant on this issue of liability, and you report that verdict, which we call a general verdict, through your foreman: Miss Stone.

Incidentally, your verdict must be unanimous, under the law.

Now, in addition, I am going to ask you to answer some specific questions dealing with the issues which I have been discussing with you so you will recognize the substance of these questions. I am going to give them to you in writing, and I am going to ask you to answer those questions, which are susceptible of a yes or no answer, save for two, which are susceptible of a very brief phrase

or sentence to answer.

Let me read these questions to you now. You don't have to worry about remembering them. I will give them to you to take with you into the jury room.

The first is a set of five questions dealing with Merced's negligence theory and the defense thereto by Auto Pak.

Question Number 1: was plaintiff negligent on July 13, 1972, in the operation of the machine?

Here, you are asked to give a yes-or-no answer.

Question Number 2: if your answer to Question 1 is yes, did such negligence proximately cause plaintiff's injury?

Again, you are to answer yes or no.

Question Number 3: was the Gobbler-16 machine in Building Number 7 negligently designed or manufactured?

Again, you are asked for a yes-or-no answer.

Question Number 4: If your answer to Question Number 3 is yes, describe briefly the negligent manufacture and/or design which you determine.

Then there is a line for you to insert what you find in that respect.

Question Number 5: if your answer to Question 3 is yes, did such negligence proximately cause plaintiff's

accident?

Now, I have a group of five questions for you to answer in respect to the alternative theory of breach of warranty and Auto Pak's defense thereto.

Question Number 1: on July 13, 1972, did plaintiff operate the machine in an unreasonable or unsafe manner?

Again, of course, as you can see, it is susceptible of a yes-or-no answer.

Question Number 2: if your answer to Question 1 isyes, did such operation on plaintiff's part proximately cause his accident?

Again, you can answer that yes or no.

Question Number 3: when Auto Pak put the machine in question on the market, was it defective and unfit to be used for its intended purpose?

Here, again, you can answer yes or no.

Question Number 4: if your answer to Question 3 is yes, describe briefly in what respect you so find.

There is a line for you to put in a sentence or phrase or two, however you want.

Finally, Question Number 5 reads: if your answer to Question 3 is yes, did such condition proximately cause plaintiff's accident?

Now, as you can see, ladies and gentlemen, in conclusion, we are not at this time asking you to decide whether or not there was any negligence on the part of Southbridge Towers in its instructions to its employees, including Merced. We are not asking you to determine whether or not there was any negligent installation or service of the machine, anything of that nature. We are only asking you to return a general verdict and the answers to these ten specific questions which I just read to you and which I am giving to you in writing.

This is another way of saying, we are only asking you to determine the case asserted by Felix Merced against Auto Pak, and that is all at this stage, at least. What happens later will depend on what happens in your verdict here.

Now, I want to give Messrs Shandell and Ivone a chance to comment upon my instructions. Perhaps I left something out or misstated something unwittingly.

I am going to ask you to take a brief recess while we go into that process. Then we will call you back and commit this issue or issues to you.

(The jury left the courtroom.)

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gw/lf

THE COURT: Mr. Shandell, any exceptions or requests?

MR. SHANDELL: Yes, your Honor.

THE COURT: All right.

MR. SHANDELL: I respectfully except to that portion of your Honor's charge which instructed the jury that Mr. Merced must prove himself free from contributory negligence.

THE COURT: Exception to you.

MR. SHANDELL: I respectfully except to that portion of your Honor's charge in which your Honor instructed the jury that Mr. Merced must prove that he did not misuse the product.

I respectfully except to that portion of your Honor's charge which instructed the jury that the fact that there were other manufacturers using safety measures was not some evidence of the failure to make a safe product.

I respectfully except to that portion of your Honor's charge which instructed the jury that they were to determine whether it was an open and obvious danger to put your hand into the machine. I think your Honor went further than was required in that instruction.

I respectfully except to that portion of your Honor's charge which instructed the jury that there is no liability for manufacturing a machine the dangers of which

are discoverable on reasonable inspection.

I respectfully except to that portion of your Honor's charge that instructed the jury that there was no requirement to install safety devices.

I respectfully except to that portion --

THE COURT: Just one moment. Excuse me. Do you mean to say that you at this stage claim that there is any evidence that there was any statute or rule requiring interlocks on this hopper door?

MR. SHANDELL: I don't so claim, your Honor, but I do so claim that doesn't relieve the defendant of the obligation to put in a safety device at that point.

THE COURT: You apparently misconstrued what I said to the jury. In other words, what you are suggesting is that I have nonsuited Felix Merced.

MR. SHANDELL: That is what I am suggesting.

THE COURT: I didn't do any such thing, with all due respect, and I remember how hard it was when I was a lawyer to keep track of what the judge was saying. I didn't intend that and I don't intend it now. Anything else?

MR. SHANDELL: Yes, your Honor, one or two more items.

I respectfully except to that portion of your Honor's charge which dealt with misuse of the product and re-

quest your Honor to charge that the defendant is liable in the case of foreseeable misuse.

THE COURT: I refuse to so charge.

MR. SHANDELL: Do you want requests now, your Honor? They have mostly been given to you in writing.

THE COURT: That's all right.

MR. SHANDELL: On some occasions you said you would charge in substance and I don't believe you have.

THE COURT: What do you want?

MR. SHANDELL: I respectfully request your Honor to charge the jury that the defendant is strictly liable if he causes injury by reason of manufacturing an unsafe product.

THE COURT: I refuse to charge to any different extent than I already have on that subject. I took my charge verbatim from the New York Pattern Jury Instructions.

MR. SHANDELL: I think that predated Cogling against Paglia.

THE COURT: I am not going to charge as you just requested.

MR. SHANDELL: I respectfully request your Honor to charge charges number five and six as requested by me.

THE COURT: Just one moment, please.

I didn't use that phraseology but in effect I

charged the point, so I will say no more about it.

MR. SHANDELL: I don't believe your Honor charged either point, so I except to that.

THE COURT: Mr. Shandell, I practically followed number six verbatim. True I did not follow five verbatim, but I am not going to say any more than I said. I believe I covered both points.

MR. SHANDELL: Your Honor has already ruled on my charges number seven, ten and eleven and I don't believe I have to repeat those requests.

THE COURT: No, you have an exception as a matter of law.

MR. SHANDELL: I respectfully request your Honor to charge that the defendant was under a continuing duty to warn of dangers in connection with operating its machine as they came to its attention and was under an obligation to give proper instructions for use of the machine.

THE COURT: I have already charged on the New York law dealing with duty to warn. It is a question of fact which I am not going to charge out Auto Pak on any more than I am going to charge out Felix Merced. You didn't waive a jury in this case, Mr. Shandell. I am not here to decide this. I am here to instruct them. I pointed out that they and they alone will decide it. I don't imagine that you could

make it much fairer than that, unless you want to waive a jury, which I am sure you don't. Exception to you.

MR. SHANDELL: I respectfully except to your Honor's interrogatories directed to the jury and specifically point out to your Honor that some of the grounds for liability instructed by your Honor to the jury, for instance, failure to warn, are not contained in the written interrogatories.

THE COURT: Obviously, obviously, obviously. Exception to you.

Mr. Ivone.

MR. IVONE: With respect to standards and codes, your Honor, I believe your Honor has indicated that counsel for the defense has mentioned that only 1970 would apply, and I think, however, that the Court should instruct this as a matter of law rather than as my argument.

THE COURT: I don't quite follow you, Mr. Ivone, to be perfectly frank. I instructed the jury that there is absolutely no statute or law which required interlocks. That is the fact. Nobody says otherwise, nobody can say otherwise, as Mr. Shandell has just admitted and I assume you will. So what you are talking about I don't know.

MR. IVONE: It is my understanding from your charge, your Honor, and you have indicated perhaps you do not pick it up as easily, but my understanding is that you have

referred to the codes or standards as being applicable only as they were in effect in 1970. However, you have related that as being my argument, not the Court's instruction, that they are to disregard any other standards which may have existed subsequent to 1970.

THE COURT: Since I instructed a number of times that under New York law it depends what happened as of the date the machine was put on the market and I specifically used the year 1970, I don't really think I have to repeat that. Exception to you.

MR. IVONE: With respect to defective design of the chute, I don't think there is any question in this case that Auto Pak neither designed it nor installed it. That should not be in the case at all.

THE COURT: I don't blame you for feeling that way. I think the argument is absurd, but be that as it may, Aaronson did make the point, as I understood his testimony, and just because I think it is an absurd argument doesn't mean anything, because I am not deciding the case, the jury is. I have heard some stupid opinions given in my time and that may top it all, but that is not my province. The jury has got to decide that. If they believe an opinion like that, it is up to them.

MR. IVONE: May I respectfully take exception to

that because the jury ought not be able to consider something which is not imputed to this defendant? That is what I am trying to drive at. It is not imputed to us.

THE COURT: The design of the guard and the positioning of the chute as it comes into the machine is certainly part of the machine. You had your own witness. There it is there on the blackboard. As I understand Aaronson, and you may have difficulty here, I agree with you, because I just think you don't have to be even a hammer mechanic to understand this, in my opinion, therefore, I suffer with you, Mr. Ivone, but that doesn't mean I as a judge have a right to take this issue away from the jury. Exception to you.

MR. IVONE: With respect to the Court's charge on breach of implied warranty, I believe your Honor followed the pattern jury as your Honor indicated. However, I did not hear your Honor mention item number two which is spelled out in the pattern jury as follows --

THE COURT: Would you mind giving me the number? I have got it right here.

MR. IVONE: I am talking about my request to charge number seven.

THE COURT: Is this implied warranty?

MR. IVONE: Yes.

THE COURT: Just one moment.

MR. IVONE: It is on page four of my requests. Then it goes on to page five. You went on to list the various circumstances under which he could or could not recover.

THE COURT: I interpolated.

MR. IVONE: You indicate, number one, that at the time of the occurrence the plaintiff had to use it for the purpose and the manner intended. You also went to number three, that the breach of warranty had to be a substantial factor. However, item two, that the plaintiff by the exercise of reasonable care would not have both discovered the breach and realized its danger.

THE COURT: I am sorry. I didn't put it in your language. Again, you have the same difficulty that Mr. Shandell has. I agree with you. But I said it quite a different way and I said it as emphatically as I care to. I will say no more. Exception to you.

MR. IVONE: Thank you, your Honor.

With respect to the law of contributory negligence and that appears in my request number nine on page five and goes over to page six --

THE COURT: Indeed it does, but I charged this jury on contributory negligence.

MR. IVONE: I want to indicate one aspect that, on

course, is not charged which is basic on the law of contributory negligence in the Sate of New York, namely, the following: the law does not permit you to weigh the degree of fault of plaintiff and defendant but requires that if you find that plaintiff was guilty of any negligence your verdict be for defendant.

THE COURT: Again I say to you I believe I said that. I did not use your felicitous phrases, that's for sure, because I talk my way, you talk yours. I am just not going to repeat that again. I made the point.

MR. IVONE: If I may preface in this respect, these are not my words, your Honor. Those are the words --

THE COURT: He is not me. That is the point I am making. I made the instruction. I decline to instruct the jury again on the subject. Exception to Auto Pak.

MR. IVONE: With respect to instructions whether Southbridge did or did not give instructions to this plaintiff, will the Court instruct the jury that anything Southbridge did or did not do is not imputable to Auto Pak?

THE COURT: I have already instructed the jury, I think, quite plainly on that. In fact, as I concluded on my remarks, I tried to make that point. Exception to you and your client.

MR. IVONE: The same request as to Universal, your

Honor.

THE COURT: The same point I will not make again. Exception to you and your client.

MR. IVONE: With respect to the plaintiff's expert Morfopoulos, will the Court instruct the jury that the failure to call a witness --

THE COURT: You didn't argue that in your summation. I thought you were wise.

MR. IVONE: What?

THE COURT: You didn't make that argument to the jury. Why should I instruct the jury?

MR. IVONE: Because I requested it of your Honor.

THE COURT: That doesn't mean I am going to do it. Exception to you. I don't understand you at all. You don't even make an argument but then you want the judge to argue it.

MR. IVONE: I established it at the end of my case that he was not called.

THE COURT: You may have established it but like a lot of other details that you windowed over and handell windowed over, that doesn't mean I have to charge the jury. I just think that's a ridiculous charge under the circumstances of this case, particularly when you didn't

even seriously argue it to the jury at all. Exception to Auto Pak.

Anything else?

MR. IVONE: No, your Honor.

THE COURT: Anything else on your part, Mr. Shandell?

MR. SHANDELL: No, your Honor.

THE COURT: Bring in the jury and we will excuse the alternate. Where are the marshals?

(Jury enters courtroom)

THE COURT: Mr. Costanso, at this point under the system we are obliged to excuse you, sir, from any further service in this case. However, I think all would join in the sentiment which I am about to express, which is that we are greatful for your participation and your obvious attention. Good-by and good luck.

What news do we have for him?

THE CLERK: Mr. Costanso goes down to room 109 to report down there.

THE COURT: No rest for the weary.

(Alternate excused)

THE CLERK: Marshals step forward, please.

(Marshal sworn)

THE COURT: Miss Stone and ladies and gentlemen,

you may now retire and take up your deliberations. Miss McKeen, the Clerk, will hand to you the written questions which we are asking you, among other things, to answer. You may how retire.

THE FOREMAN: May I ask a question?

THE COURT: Miss Stone?

THE FOREMAN: In answering these questions, must the answer to each question be unanimous?

THE COURT: Yes, that is the law.

(At 11:45 a.m., the jury retired to deliberate.)

THE COURT: Off the record, gentlemen.

(Discussion off the record)

(Recess)

(At 2:55 p.m., the jury entered the courtroom.)

THE CLERK: Members of the jury, please answer present as your name is called.

(Jury roll call)

THE CLERK: Madam Forelady, has the jury agreed upon a verdict on the question of liability?

THE FOREMAN: They have.

THE CLERK: What is your verdict?

THE FOREMAN: The jury finds the defendant, the Auto Pak Company, liable for the acts against Felix Merced.

THE CLERK: Has the jury agreed upon answers to

the questions which were submitted to you by the Court?

THE FOREMAN: They have, unanimously.

THE CLERK: What is your answer to question one?

THE COURT: We are dealing now, Miss Stone, as I think you know, with the group headed "Negligence Theory."

THE FOREMAN: I thought I had handed those in. No I have them. Excuse me while I change my glasses.

THE COURT: Certainly.

Take a look at the page which is headed "Negligence Theory." Do you see that?

THE FOREMAN: Yes. Shall I read the questions?

THE COURT: Beginning with the question which reads as follows, number one, "Was plaintiff negligent on the morning of July 13, 1972?" is that the page you have in front of you?

THE FOREMAN: I have.

THE COURT: What is your answer to question number one?

THE FOREMAN: No.

THE COURT: Number two.

THE FOREMAN: It does not require an answer unless the answer was yes.

THE COURT: So you have no answer there.

Number three.

THE FOREMAN: Yes.

THE COURT: Number four.

THE FOREMAN: I have written, "Please see attached sheet."

THE COURT: Read us what the attached sheet says.

THE FOREMAN: "A mechanical device to avoid bridging was not incorporated in the design. Therefore, machine could not function as 'automatic' but required frequent manual assistance. Also, no protection was offered from objects ricocheting from deflection plate when hopper door was open."

THE COURT: Number five.

THE FOREMAN: The answer is yes.

THE COURT: All right. Now we turn to the second page which is headed "Breach of Implied Warranty Theory." Question number one.

THE FOREMAN: No.

THE COURT: Number two.

THE FOREMAN: Does not require an answer unless yes.

THE COURT: Very good. Number three.

THE FOREMAN: Yes.

THE COURT: And number four?

THE FOREMAN: Please see attached sheet to negligence theory which I have just read and furthermore the machine should have been provided with additional safeguards such as an interlock on the hopper door.

THE COURT: All right. And number five?

THE FOREMAN: Yes.

THE COURT: Very good.

THE CLERK: Members of the jury, please listen to your verdict as it now stands recorded. You say that you found a verdict in favor of the plaintiff?

THE FOREMAN: Yes.

THE CLERK: The jury has agreed upon answers submitted by the Court. Question number one, no; question number two does not need to be answered; question number three, yes; question number four, "Bridging and additional requirement of manual assistance," and so forth.

THE COURT: Excuse me a moment. So the record is clear, we will take it that the answer to number four is as read a moment ago by Foreman Stone which you all heard.

THE CLERK: Question number five, yes.

THE COURT: Now we turn --

THE CLERK: Questions on the Breach of Implied Warranty Theory.

Number one, no; question number two, not needed

to be answered; question number three, yes; question number four as indicated by Miss Stone; question number five, yes.

And so say you all?

JURORS: Yes.

THE COURT: Now, I wonder, Miss Stone, if we could have those two pages together with that separate written tag which you and the jury prepared to answer question four on both sheets and we will mark that as Court's number one for identification so the record will show, gentlemen, what that is.

Do you follow?

(Court's Exhibit 1 marked for identification.)

THE COURT: Ladies and gentlemen, before we proceed to the next phase of the case, I am going to ask you to take a brief recess so I can consult with counsel and we can prepare ourselves to move along as we need to once I have that conference with them. I will tell you what. We will leave the exhibits, Miss Stone and ladies and gentlemen, right where they are at the end of the jury box. You don't have to worry about those now. If you will just take a brief recess and we will call you back in a few minutes. Thank you very much.

JUROR: Am I allowed to call my wife now?

THE COURT: If you want to call your wife, you

will have to ask the marshal. Would you ask him? He will take care of it. You just talk to him and he will arrange it.

(Jury leaves courtroom)

THE COURT: Now, gentlemen, during the interim and off the record I asked particularly defense counsel, Mr. Ivone for Auto Pak, and counsel for the Southbridge Towers, I couldn't ask counsel for Universal because he was not here, as to what your pleasure was. You want the third party claims tried out to the jury at this point or do you want to waive the jury? How do you want to proceed?

MR. IVONE: I had indicated to counsel for the third party defendants that I would consent to the Court deciding it.

THE COURT: What's the position of Southbridge Towers, Mr. Isaac? How do you want to proceed?

MR. ISAAC: I find it very perplexing. It is a psychological question, your Honor. I have been giving it some thought. I will stipulate that the Court may decide the question of fact or law as it relates to the claim by Auto Pak against my client.

THE COURT: All right. Mr. Regan, how do you feel on behalf of Universal?

MR. REGAN: Your Honor, I would be willing to

let your Honor decide that question. However, I am not that well connected with the insurance company that retained me to try the case to speak that boldly. Would your Honor give me a minute to make a telephone call?

THE COURT: I wish you would right away for obvious reasons.

MR. REGAN: I will urge them to do that.

THE COURT: Whatever they say. I realize they have the right to have their say and I will accept whatever they say.

MR. IVONE: Your Honor, motions subsequent to the verdict, would you have them later?

THE COURT: If you wish to place on the record any motion at this point, you may.

MR. IVONE: First of all, your Honor has reserved decision on my prior motions. I now renew those motions and further move to set the verdict aside first of all on the ground that it is contrary to the weight of the evidence, especially with respect to contributory negligence and, second, as to negligence. Apparently question number three which the jury answered, that there was no mechanical device to avoid bridging and there was no protection from ricocheting objects once the hopper door is opened, that, incidentally, your Honor, was never referred to by their own

expert as requiring it. The only thing the expert said was that interlocks should have been required on the hopper door. The very basis for their deciding that the design was not proper was not actually presented to them.

THE COURT: I will reserve decision on that renew motion and on the motion at the end of the liability portion of the case so far as Auto Pak is concerned in the case against it by plaintiff.

MR. IVONE: I urge the same argument even as to their breach of warranty verdict, your Honor.

THE COURT: All right. May I see Court's Exhibit 1?

I am sorry, Mr. Kohler.

MR. KOHLER: At this time, your Honor, I want to renew the motion of Auto Pak Division of Gulf and Western to dismiss the plaintiff's complaint. Your Honor, the plaintiff stated in argument on my prior motion that there was a violation of the Bulk Sales Act, and we have seen no law, no fact to link Gulf and Western in any way to this action. The contract is in evidence. The contract in no way states that Gulf and Western was to buy the liabilities of Auto Pak.

THE COURT: May I see the contract? I confess that I need refreshing. I have been focusing on other matters.

MR. SHANDELL: This isn't the one in evidence.

MR. KOHLER: There is one marked in evidence.

THE COURT: That is what I want to see?

MR. SHANDELL: Let me get it from my bag.

(Pause)

THE COURT: Refresh me.

MR. KOHLER: The clause I had in mind, your Honor, is paragraph G, "Warranty Obligations."

THE COURT: In other words, that according to this all claims relating to Auto-Pak line products sold or leased by seller, which is our defendant Auto Pak Company, Inc. -- correct?

MR. KOHLER: Yes, your Honor.

THE COURT: I am inclined to agree with you.

MR. SHANDELL: May I argue, your Honor?

THE COURT: Just one moment. You will get your chance.

MR. SHANDELL: Thank you.

THE COURT: I am inclined to agree with you. I have never understood, now that I am refreshed, how in the world this defendant is in here particularly in view of this clause. As to Bulk Sales Act, I have never had any explanation at all, let alone a comprehensive explanation, of what the plaintiff even means by that. So let's hear from you.

Mr. Shandell.

MR. SHANDELL: Your Honor, it says in this contract that both parties waive compliance with the Bulk Sales Act. It says so in paragraph 20 on page 25. It further says in paragraph 23 that the agreement shall be governed according to the laws of the State of New York. Now, according to the laws of the State of New York if one company buys all of the assets of another company, the acquiring company has to send out notice to all the creditors and comply with all kinds of other technical requirements. Otherwise, the acquiring company by operation of law, the Bulk Sales Act, remains liable for all the liabilities of the selling company.

MR. KOHLER: Your Honor, if I may be heard, the plaintiff here was not a creditor of Auto Pak at the time the sale was made. The accident didn't happen until after the sale was made.

THE COURT: In other words, July 13, 1972, came after the date of the closing.

MR. KOHLER: That's right.

MR. SHANDELL: Yes, your Honor.

THE COURT: In any event, for that and other reasons, I don't think the Bulk Sales Law of New York applies here, in any event. So your motion to be dismissed from this case is granted and the real party, as I have always thought,

is the defendant that we know, which is named first in the caption, and that is Auto Pak Company, Inc. So the case will be dismissed as against Auto Pak, Division of Flinchbough Products Division of Gulf and Western Systems Co.

MR. KOHLER: Thank you, your Honor.

THE COURT: Now we come to one other item that I would like to discuss with you, Mr. Shandell, the matter of damages. As I told you, and I confess again on the record that I had overlooked this, but tomorrow is apparently an official holiday.

MR. SHANDELL: Yes.

THE COURT: I also am aware, as you all are, that we have had our jury with us for six days now. I am wondering. It seems to me that the efficient, less painful means of proceeding would be to have another jury if need be resolve the damages issue and I had in mind that we would get to the damages issue, if we had to try it out, after we resolve the question of whether or not Auto Pak is entitled to contribution under the Dole versus Dow case and its progeny rule in New York State.

Of course, we could hang on to this jury, we could excuse them and call them back by telephone or some other written summons, if need be, at a later date. But what would your view on that be?

MR. SHANDELL: May I ask what your Honor's proposed timetable would be?

THE COURT: That's the problem. I can't do this case next week. The following week I have another trial which involves bringing people from all over the United States, and I endeavored to give them a day certain. Then in the week beginning I think it is March 3rd, I have a criminal case which under the rules certainly deserves priority over this. That case, if it actually goes to trial, may go on trial for weeks, or so they tell me. I have already tried a number of the defendants in the same case last fall. The case took -- there were two defendants there, two accountants. The case took a little over three weeks to try. I would think I could try this case, which involves only one remaining defendant, who is a lawyer, in probably two weeks, but it is a lot of proof. It is the so-called National Student Marketing criminal case or what remains of it. Unfortunately, those cases do take a fair amount of time no matter how diligent the lawyers and the judge and the jury may be.

It may well be that I can't reach the damages issue until late March. I am sorry about that, but the United States District Courts, particularly this one, are really caught by all these priorities which are now embedded

in the rules or in the statutes. I don't see any other way and I also am afraid that in the case which is going to start the week after next where we have got correctional officials coming in from the Bureau of Prisons, and they are all from way out of state across the country, and as a matter of minimizing trouble and expense for the litigants and their lawyers, I don't see any way of putting that off again, particularly when I agreed, as I did, to give them a day certain to accommodate that particular problem. But, as I say, I suppose there would be nothing wrong I know of. We could send this jury home and then tell them that we may have to notify them by phone or by note to come in and hear and determine the damages issue, if need be, or we could pick another jury, tell them what happened here and try out the damages before them.

MR. SHANDELL: And this would be late March or something like that?

THE COURT: I am afraid the way it looks now. You know litigation is litigation. Who knows? At the last minute somebody may plead guilty or somebody may settle. But I at the moment don't think those eventualities are likely. I am familiar with these cases which have been set up for the next week. Efforts have been made to settle and I dare say in the criminal case the conversations have been had

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between the prosecution and the defense about a plea.

MR. SHANDELL: In my view, your Honor, since the case has to be put over, whatever your Honor thinks is proper, whether to call this jury back if they are willing to come back or pick a new jury, I would go along with it.

THE COURT: All right. You gentlemen in the back have any views that you want to express?

MR. IVONE: Your Honor, if the Court cannot try it this week with this jury, I see no point in calling this jury back.

THE COURT: How do you feel about it, Mr. Isaac?

MR. ISAAC: I presume, your Honor, maybe I am wrong, that the Court will entertain some motions of mine at this time.

THE COURT: I don't assume you have any motions to make. You have already made them and we have got to get to the issue of the third party cases. But you will have plenty of time to make those motions and new ones, if you care to.

MR. ISAAC: I thought the Court was going to rule on the third party complaint.

THE COURT: Not until I hear you. I have to decide, first of all, after I hear from Mr. Regan and his views, how we are going to handle that. So all I am asking

you now is if we get to the damages issue on trial, what would be your preference, if any? Do you agree with your colleagues Messrs. Shandell and Ivone or how do you feel about it?

MR. ISAAC: May I ask what may seem like a foolish question, your Honor?

THE COURT: I am sure it won't be foolish. What do you want to ask?

MR. ISAAC: Is the Court going to decide the third party issues today? That was my understanding.

THE COURT: I am going to have to hear counsel. Then I will have to hear counsel or decide it overnight. I don't want to tie myself down. I really can't answer that. I am going to try to if I can.

MR. ISAAC: The reason I ask is not to be offensive in any way, but it is because in discussing this matter I made certain commitments that perhaps the judge is going to entertain these things today and not in March. I have no objection to whatever the Court deems is reasonable and proper under the circumstances if I am here.

THE COURT: I understand you. Mr. Regan, what does your company wish you to do?

MR. REGAN: They are willing to go along with my judgment on the case and I am willing to go along on your

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judgment of the case.

THE COURT: In other words, waive the jury for the third party determination.

MR. REGAN: Yes. I have one question I would like to pose. I would like to find out whether your Honor's decision on that motion would be based on the record as it stands at the present time?

THE COURT: You mean will the third party cases be based on that?

MR. REGAN: Yes.

THE COURT: I assume that you have put in all the proof you wanted to.

MR. REGAN: Yes.

THE COURT: Very good. Then what I think I will do is I agree with what I will call the Shandell-Ivone view. I think probably, just in human fairness to this jury, it would be better to probably excuse them from this case. It might also -- it is impossible for any of us to be sure of this, of course, but it might also possibly be argued that it would be prejudicial to somebody if we were to call this group back, say, in late March if I got really tied up, and I wouldn't want to see that really happen to either Mr. Merced or Auto Pak or if we determine anybody else makes a continuation, whoever that other party is. I just wouldn't want

to run that risk. So what I am going to do, gentlemen, is I am going to call the jury in, thank them for their service, explain that you have stipulated to try the third party cases to me and that we are then going to excuse them with our thanks or at least my thanks.

MR. IVONE: Would it be appropriate at this point to poll the jurors to determine if, in fact, the verdict was unanimous?

THE COURT: Certainly.

MR. IVONE: That question was asked of number one.

THE COURT: They all nodded their heads. If you want me to do it again, I would be glad to do so.

MR. IVONE: I would appreciate it.

THE COURT: Bring them in.

(At 3:23 p.m., the jury entered the courtroom.)

THE CLERK: Members of the jury, please listen to your verdict as it now stands recorded. You have found in favor of the plaintiff. You have reached the following conclusions to the answers submitted to you by the Court.

THE COURT: Excuse me. You have reached unanimously the answers to the special questions as follows:

THE CLERK: Question number one, on July 13th --

THE COURT: All you have to do is read the answers.

THE CLERK: Question number one, no; question

number two, not necessary to answer; question number three, yes; question number four, attached note: "A mechanical device to avoid bridging was not incorporated in the design. Therefore, machine could not function as automatic but required frequent manual assistance. Also, no protection was offered from objects ricocheting fromdeflection plate when hopper door was open. Furthermore, the machine should have been provided with additional safeguards such as an interlock for the hopper door."

Question number five, yes.

(Each juror, upon being asked by the Clerk, "Is that your verdict?", answered in the affirmative.)

THE CLERK: The jury is polled, your Honor.

THE COURT: Thank you.

Miss Stone and ladies and gentlemen, I want to say to you that in your absence counsel have stipulated and agreed that the third party case will be tried to the judge and, more than that, they have agreed that if as and when necessary on the damages issue we'll try that out later, if need be, before another jury. I think in part, if I may say so, the reason that they were good enough to come to this agreement, they realize that you have sat on this case for six days and perhaps that motivated them to think that since these other matters will take time if we need the assistance

of another jury we will select another jury at that time for that purpose.

Therefore, I am in a position where we can excuse you. I want to say, however, my special thanks because I noticed you listened most attentively and carefully throughout, and I noticed that you took time to consider the questions of fact which you had to resolve in order to reach your verdict. For that no one can ask any more than what you achieved. So I will say good-by and Godspeed to all of you.

I don't know what news we have to give them.

THE CLERK: They are to report back downstairs to room 109, and I believe they have a questionnaire and some certificate of merit or something like that that they will give you.

THE COURT: It sounds to me like they are going to give you a certificate of service. So it may be you won't have to serve any more after you go down there. In any case, whatever, good-by and good luck to all of you.

(Jury leaves courtroom)

MR. IVONE: May I thank you for your time.

MR. SHANDELL: We all thank the jury for their time and attention in this case.

THE COURT: Mr. Ivone, Messrs. Isaac and Regan, would you like to take a few moments to collect your thoughts

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and then we will take up the argument?

MR. IVONE: Yes, your Honor.

THE COURT: Why don't we take a five-minute recess.

MR. IVONE: Off the record a moment.

(Discussion off the record)

THE COURT: Mr. Ivone, what say you?

MR. IVONE: Do you want me to speak first as to the third party plaintiff?

THE COURT: You are the third party plaintiff. I want to hear you first as against Southbridge and then as against Universal. I assume that's the way you want to proceed. Isn't it?

MR. IVONE: Yes.

The claim with respect to Auto Pak against Southbridge has to do with instructions, your Honor, instructions to the plaintiff on safety and how to safeguard himself from injury while using the compactor. Implicit in the decision of the jury that the plaintiff was free from contributory negligence or any contributory fault would go, I believe, it would give rise to the inference that he was not instructed that he should not put his hand into the compactor while the compactor was operating. Otherwise, it would seem to me if they had believed that he had such instructions, and

this has been the contention of the Southbridge through their own witnesses, that he was instructed specifically, do not put your hand into that compactor while it is operating, you don't pick out a stick, you don't pick out anything, for that matter while the compactor is operating, and since the jury has found in his favor that he was free from negligence, we can only assume that they must have also decided that he did not receive such warnings and instructions.

That being the case, it would seem to me that Southbridge must indemnify Auto Pak for its failure to give the instructions.

THE COURT: All right. Now what about Universal?

MR. IVONE: It is my understanding, your Honor, from the testimony of Southbridge that, first of all, instructions were given from Universal. Sometimes it is conflicting. There appears to be testimony that Universal did not say specifically, do not put your hands in there while the machine is operating, and then there is testimony from employees, such as Diaz, who have indicated that the supervisors of Southbridge were instructed by Universal and that the supervisors then instructed Diaz and Diaz in turn instructed the plaintiff, to wit, do not put your hands into the machine: If that is true, if the Court should decide Universal did give the instructions to Southbridge, obviously the third

party complaint as against Universal will have to be dismissed. On the other hand, if the Court should decide that Universal did not give proper instructions to Southbridge, to, in turn, convey on to the person, namely, Mr. Merced, then Universal owes indemnification to Auto Pak.

May I add this, your Honor, very briefly: the fact that Southbridge concedes that they instructed the plaintiff and in substance they are saying they received information from Universal is a recognition on their part of their responsibility to instruct the plaintiff, and if we are to assume now that the jury has found that they did not instruct, otherwise they could not have found the plaintiff was free from any negligence, it would seem to me they have conceded to their own duty and obligations. In other words, they are saying, yes, we know we are supposed to instruct them and we did do it. Apparently the jury does not agree.

THE COURT: Well, I see your argument, but I am not sure that we should assume that the jury did that because we were asking them, I believe, not in the closing arguments but in the judge's charge to focus on manufacturer's liability and not more. You could be right, I agree, but I don't think that would be necessarily controlling as a matter of law now.

MR. IVONE: I understand the Court was asking the jury to focus on manufacturer's liability as far, presum-

ably, the design and manufacture of machine is concerned, but your Honor also asked them to focus upon contributory negligence of the plaintiff and the only way he could be negligent would be putting his hands in them, I assume not following instructions of Southbridge. But they first have to find, yes, he did receive the instructions --

THE COURT: Don't you think it is more realistic to assume from that vantage point that what the jury determined was that Southbridge did not instruct him, Felix Merced, adequately?

MR. IVONE: Yes, that is what I am asking you to infer. What's that got to do with Universal?

MR. IVONE: If that would be your finding, for example, then Universal is out.

THE COURT: Let me put it to you --

MR. IVONE: I am agreeing to that.

THE COURT: Let me point out something to you which may change your argument, possibly. I have recalled and my notes seem to affirm or confirm this, that Mike Herman, when he testified on February 3rd, he stated that both the Universal and Charter people later orally advised presumably him and other supervisory personnel but at least him, Mike Herman, that the machine should be shut down in case of any serious blockage by the refuse.

Now, then Mike Herman went on to state that if he saw men -- I assume he meant by that porters -- putting sticks in when the machine was running, he told them to cut that out. In other words, he told them to shut off the machine before they followed that procedure using that stick of some four feet in length even though everybody always said it was three feet. I think you will agree with me it is closer to four feet, the one in evidence certainly, and I think that is probably typical.

So accepting that testimony as true, wouldn't that suggest that Universal was pretty careful to get across the point at least to the supervisory personnel to whom they talked that, look, if there is any blockage there, don't be fooling around that machine or having your people fool around with that machine unless the switches are cut off?

MR. IVONE: I agree with you.

THE COURT: If that's so, doesn't that really exonerate Universal?

MR. IVONE: Yes, sir.

THE COURT: No one claimed their installation was faulty and Danziger testified, and I don't think anybody controverted this, that what they did when Universal came in acting as installer for Auto Pak, he identified Plaintiff's 4, you know, the yearbook, as I call it, or the brochure, and

said that, really, all they did was pretty much install the thing according to that book, their own common sense,and then he went on to say that Universal people did tell the Southbridge supervisory people that if there was any doubt about the functioning of the Gobbler they should cut the main switch or the switch and call them, that is, Universal. So that seems to be reasonably consistent with what Mr. Herman said.

MR.IVONE: I don't disagree with that.

THE COURT: Wouldn't that point to pretty strong evidence from which Universal could argue, "Look, we did everything reasonable to make it clear that this machine could be dangerous if somebody started poking around in it if there was any bridging or a jam-up in material or whatever or any malfunctioning of any kind."

MR. IVONE: Yes, Judge, you can infer such a fact.

THE COURT: What else do you want to say? I think I understand you. What else do you want to say, if anything?

MR. IVONE: Ithink that is the essence of what the cross claim is about.

THE COURT: Mr. Isaac.

MR. ISAAC: May it please the Court, in the very

first instance, I am renewing my motion to dismiss the third party complaint as a matter of law, which is a motion that I previously made after the third party plaintiff had rested his case. I address myself to that issue at this moment and to save time, your Honor, I will also alternatively address myself to the factual situations because now the Honorable Judge Tyler is a juror who must decide questions of fact.

THE COURT: Correct.

MR. ISAAC: The jury did not in any way, manner, shape or form make a decision on the question of instructions or lack of instructions by Southbridge to the plaintiff. The judge in this case has spent considerable time in charging the jury and making it perfectly clear to them what their responsibility was insofar as this phase of the case is concerned. There is nothing except by imagination alone and speculation and conjecture to assume that by the jury's verdict in this case they have made a determination that my client was somehow negligent or careless or did something improper insofar as their running of the building is concerned. I think to argue that point is to argue "foolishly" because no such determination can be made. There are many reasons why the jury could have returned a verdict in favor of the plaintiff, against the defendant and a finding of no contributory negligence without there being a failure to instruct

on the part of my client, which was not even part of the case.

THE COURT: Let's face it. I agree with you certainly to the extent that we cannot consider the jury's verdict legally binding upon your client in the third party case. That would be wrong and unfair, as I see it.

MR.ISAAC: I would hope so.

THE COURT: You are renewing your motion. You say as a matter of law there is no case by Auto Pak against Southbridge Towers. Now, why is that so?

MR. ISAAC: I am addressing myself now strictly to the question of law.

THE COURT: Right. Why is that so?

MR. ISAAC: I say that to your Honor because an evaluation of evidence, and I am not talking about a factual evaluation, I am talking about a legal evaluation, does not create a prima facie case of actionable negligence against my client. The determination by the jury in this case is of some consequence in determining that issue, because the jury has found, number one, that there was a breach of warranty on the part of Auto Pak, number two, that the defendant Auto Pak was negligent in the manufacture and design of the particular machine. It has found that the proximate cause of this accident -- it has found that the proximate

cause of this accident was the breach of warranty, it has found that the proximate cause of this accident was a negligent design and manufacture of a particular machine, and you have the statement made by the jury in answer to one of the questions where they had to briefly describe the basis for their finding which the Court must consider as a matter of law together with the testimony in the case.

Now, considering the jury's verdict, considering the statement made by them in their brief description, considering their yes, no answers and considering the fact that Mr. Merced was doing this compactor work since 1971, giving him the benefit of the doubt, he was doing this compactor work since April of 1972, and he did it five days a week every single week, April, May, June, July, considering the fact that there were no prior accidents to Mr. Merced or anybody else in connection with sticking a hand into a machine, in consideration of Mr. Melendez' testimony,a witness brought by the plaintiff, who testified you didn't have to put your hand in that machine and that's why they issued the stick. Assuming Mr. Merced's testimony that when he got on the compactor job he learned from the porters how to use the stick, which is contrary to his original position. Assuming the testimony of the other witnesses where it was agreed he was never instructed to put his hands

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into the machine, not the stick, his hands into the machine. Considering Mr. Merced's own testimony, your Honor, on cross examination where finally after pulling teeth he had to admit Mr. Nelson never told him to put his hands in the machine when it was working, Mr. Herman never told him, Mr. Rivera never told him, Mr. Diaz never told him, Mr. Sulliverez never told him. Considering further his expertise with this machine, his testimony that the switches were on the machine, it was on the wall, there was a reverse switch. Assuming that he knew about the stick and how to use it from the porter Assuming the other testimony in this case, your Honor, by witnesses presented by the plaintiff and by the third party plaintiff, and Mr. Rivera is a witness that was called by the third party plaintiff. Considering the testimony of Mr. Clar who designed the machine, who was aware of blockage. Considering the testimony of Mr. Danziger, who installed the machine, who said that he was aware of a bridging problem. Then how do you take care of the bridging problem? You take a stick or a broom and you hit it. This is the testimony of the third party defendant Universal. It is part of the record, your Honor. I say to the Court that there is no possible way from a legal standpoint that my client can be guilty of negligence as a matter of law.

THE COURT: Let me point out a couple of things.

MR. ISAAC: Surely.

THE COURT: First of all, you heard Mr. Ivone and me review facets of the testimony of Mike Herman, your superintendent, and Mr. Danziger, the secretary of the former Universal firm.

Now, if this Court accepts their testimony that Universal on a number of occasions, and Charter, also, according to Mike Herman later after Charter came in as the maintenance firm, told the supervisory people at Southbridge that if there is any bridging or blockage, shut the machine off and call us, if that's accepted you could infer negligence on the part of Southbridge because they didn't apparently do that.

MR. ISAAC: I beg to differ with the Court. I can show the Court the testimony not only on the trial but at the examination before trial --

THE COURT: No. I am aware of that.

MR. ISAAC: -- of Mr. Danziger, your Honor, where no such recommendation concerning bridging was ever made to my client.

THE COURT: Wait a minute. He may have said that, too, but he said a lot of other things.

MR. ISAAC: Mr. Herman never said he was given instructions on bridging, your Honor. What you are referring to --

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to --

THE COURT: Let me go back to February 3rd.

MR. ISAAC: May I help the Court? Your Honor was referring to the testimony of Mr. Herman where he was describing that you would use the stick to push down the garbage. But in case that didn't work, they would then have to call the service company, which was Charter Compacting in July. He never testified he was given instructions by Charter about bridging.

THE COURT: I will accept your version. He still said enough to make the point I am making. Herman says if he saw someone putting a stick in when the machine was running, he told them to cut it out. The inference one could draw from that is that some of these porters weren't carefully instructed or trained at all.

MR.ISAAC: How could the Court draw that inference from one sentence?

THE COURT: Why would Herman have to catch somebody doing something which other witnesses said they trained these fellows not to do?

MR.ISAAC: A person can be trained --

THE COURT: I am saying you can't make this a question of law. There is conflicting testimony to a certain extent, and I don't mean these men are liars. People recall

and understand things differently. Second of all, there are conflicting inferences one can draw. That is a fact question.

MR. ISAAC: May I address one further time on the law issue?

THE COURT: Yes, that is what I am pressing you on. You seem to be arguing facts to me. I want to know why it is as a matter of law that Southbridge should be exonerated.

MR. ISAAC: Because the testimony in the case, and in order for the Court to make a determination legally, the Court must consider the evidence, what it has heard. There is nothing in this record, absolutely nothing, and I have listened very carefully, to indicate even a scintilla of evidence that the plaintiff or any other porter was instructed to put his hands in the machine, and I am thinking about every witness that came here.

THE COURT: I agree with you. Nobody instructed Felix Merced or anybody else, I assume, that he could put his hand in the machine without more. I don't think I disagree with you. But that doesn't end the case.

MR. ISAAC: Alternatively speaking as a matter of law, there is nothing, Judge, nothing with any kind of substance to the -- I am not talking about conjecture now, I am not talking about speculation. There is nothing of substance that a trial judge listening to the evidence can say

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we violated a common law duty, we should have instructed them a, b, c and d and we didn't, or we failed to instruct them to do a, b, c and d which we should have. I am saying to the Court at this moment as a matter of law there is nothing in this record to warrant, as a matter of law, a finding that we failed to instruct a, b, c and d when we should have or that we instructed a, b, c and d and we didn't. I am saying we are involved in conjecture, we are involved in speculation. I ask the Court to consider the fact that there is nothing by the evidence which would warrant a finding of improper instruction or failure to instruct.

THE COURT: That's a fair argument, but I regard that as a factual argument. So let's hear you on that.

MR. ISAAC: May I go to another topic as a matter of law before I get to the facts?

THE COURT: I would hope so. If you can, fine, but I haven't really, a legal point yet. Everything you are saying seems to me to be a factual argument which I don't blame you for. You have plenty to go on. What's the legal point?

MR. ISAAC: Another legal point before I get to a discussion about facts is the question of proximate cause which a court must first consider in the first instance. If this case were going to a jury the Court would have to

determine whether there was legally sufficient evidence produced by the third party plaintiff to warrant as a matter of law this case going to the jury on the question of proximate cause, and I say to the Court there is nothing in the evidence in this case of any substance, putting aside conjecture and putting aside speculation, to warrant an issue of fact on the question of proximate causation between instructions and the happening of this accident. That's my second point on the question of law.

THE COURT: All right. Let's get to your factual argument.

MR.ISAAC: With respect to the facts in the case, I don't believe it is necessary to stand before the Court and argue a closing statement that I would normally argue to a jury if they were going to decide the questions of fact, without assuming there is a question of fact. I now address the Honorable Harold Tyler as a juror, a question to be determined by the judge as a juror, a question of fact, without really conceding there really exists any. I don't have to tell the Court that the Court has to exercise common sense and logic in weighing the credibility of the case against my client, evaluating the testimony from a factual standpoint now, putting aside the legal standpoint, from a factual standpoint, and the Court does that as a juror I am

sincerely convinced and honestly convinced that no jury could or should return a verdict on the factual situation against Southbridge. I just do not believe your Honor, that based upon an examination of all of the testimony in this case, including an analysis of the witnesses' testimony, that a jury deciding this as a qualification should honestly and honorably return a verdict of liability on the third party complaint by Auto Pak.

Sir, you have as a matter of law in this case a finding of breach of warranty against Auto Pak. You have as a matter of law in this case a finding of negligence against Auto Pak. You have as a matter of law in this case a statement of the jurors concerning the basis for their determination. You have the testimony of the plaintiff Merced, and I am not going to go into that again, where the bold statement at one time, I was never given instructions, has not been verified. Originally there was an allegation that my client may be liable over for some percentage on the theory that the plaintiff Merced said, I was never given an instruction. Now I say to the Court -- I am sorry.

THE COURT: I don't think you have to just treat it that simplistically. I don't believe him at all. I think he was given some instruction. The question is what. Was it adequate on safety measures?

MR.ISAAC: The third party plaintiff would have to prove it wasn't.

THE COURT: That is what Mr. Ivone is contending precisely.

MR. ISAAC: I haven't heard any evidence which would indicate --

THE COURT: Mr. Ivone laid it on the line. He didn't dilate extensively but he put it on the money. He claims that accepting for the moment at least the findings of the jury of negligent design and manufacture or breach of implied warranty, accepting that, the fact is that your people owe a contribution because, as he says, there is proof that Merced at least was not adequately instructed.

MR. ISAAC: I am asking the Court rhetorically where is the proof.

THE COURT: What you overlook is there are a few people in this courtroom who understand street Spanish. I agree with you. I don't blame him at all. He was too categoric to be real. That doesn't exonerate Southbridge even if true.

MR. ISAAC: I think it does to a certain extent, in any event. The third party plaintiff is relying upon the testimony of Merced to institute to a great extent the third party claim over.

THE COURT: If I asked Mr. Ivone he would say, I am not only relying on what Mr. Merced said, I'm relying on what everybody else said, and if you cut through it all, recognizing that Merced, as everybody agreed, took off and went to Puerto Rico, came back in December of '71, that it is very unclear when he was given the job in building number seven, dispute the testimony of Rivera, Diaz and everybody else, that he was really adequately instructed. Is this a fair, simplistic dialogue as you would give it, Mr. Ivone?

MR. IVONE: Yes.

THE COURT: This is the argument.

MR. ISAAC: What I am trying to say to the Court, the Court is now putting me and my client in the position of having the burden of proof.

THE COURT: No, no. I just want to know what your answer is to that argument of Ivone.

MR. ISAAC: My answer is, number one, the determination of the jury has absolutely no binding effect on the issue of credibility.

THE COURT: You said that. I know that.

MR. ISAAC: Number two, there isn't any evidence in this case that we failed to instruct properly. There is no evidence in this case that we instructed improperly. There is no evidence in this case that this gentleman, if you want

to listen to the testimony, did not receive instructions. The evidence affirmative shows the following: that he did receive instruction by Rivera, by Diaz. The testimony by Mr. Melendez indicates that he as a porter received instructions. The testimony of Mr. Merced indicates he knew where the switch was, he knew where the wall switch was, he knew where the reverse switch was, he knew where the light beam was. He was never told to put his hands in that machine. This is all part of the case as a factual situation, Judge. Rhetorically, how can you argue, well, maybe you weren't instructed properly? On a question of fact, we are not going to involve ourselves in conjecture. There is no third party complaint insofar as Auto Pak is concerned against my client for failure to instruct, because there is no proof that we violated any duty, that we didn't instruct properly, and I say this, Judge, as a matter of fact, because now we are going into the factual situation. Mr. Merced at one time said he was never given an instruction. We found out that he was given an instruction by the porter, we found out that he had ninety days or three months in which he watched this compactor before he was permitted to use it. That is substantial evidence, your Honor. We have evidence here that he watched this machine being operated for ninety days, that he knew where the switches were, he knew where the wall

switch was, he was given instruction in use of the stick, he was never told to stick his hand into a machine, he was never told to do anything improperly. There just does not appear a prima facie case or if there is a prima facie case this factual situation must resolve in favor of my client.

THE COURT: If one were to literally believe everything that Rivera said, for example, there is a lot of support for your argument, and Diaz.

MR. ISAAC: Or the plaintiff or Melendez.

THE COURT: Somehow or other, I think the plaintiff was overegging the pudding. I think he received instruction even though he categorically denied it, but I am not so sure but what maybe he didn't receive adequate instruction. That's where the issue really is in a sense.

MR. ISAAC: The third party complaint is really no different than a regular complaint. There has to be a prima facie case. The preponderance of evidence has to be on the one making the claim.

THE COURT: I agree. As you put it, you don't have the burden of proof. The third party plaintiff does.

MR. ISAAC: We can sit down and say, "I don't know if it was adequate or not," but the burden is on the one making the claim of contribution to support that, not by conjecture or speculation but by positive proof, and I say

as a juror evaluating all of the testimony, there has been a failure to establish that third party complaint.

In addition, your Honor, my client has a breach of warranty claim against Auto Pak, which I say as a matter of law must now be granted. As a matter of law. Because the finding of the jury is also something that my client can now take advantage of because it is the law of the case. The jury has found a breach of warranty. The jury has found negligence and my client, who is the purchaser of that item, there is no dispute as to that, the ultimate consumer of the Auto Pak compactor, is entitled as a matter of law to the benefits of that finding in this particular case. That is just additional information or additional argument on my part requesting, very sincerely, for the Court to exonerate my client and permit me to withdraw from this case.

THE COURT: You can't piggyback on Mr. Merced, can you?

MR. ISAAC: Yes, sir.

THE COURT: It could be argued you were negligent with recognizing that you had this bridging problem or congestion problem in the chute or, more accurately, the angular mechanism with the deflector plate that guided the refuse down into the compaction chamber, but you never did anything about it for years. How can you now turn around simply

because Merced has recovered against Auto Pak and say, "Hey, hey, count me in, too"?

MR.ISAAC: I think, your Honor, that it is elementary -- I think it is elementary and, of course, I could be wrong.

THE COURT: You may, but I never heard of a case where that has happened. I may be asleep.

MR.ISAAC: I think there is ample evidence of the fact that if a jury returns a verdict against a defendant for breach of warranty and negligence in the manufacture and design and the consumer in the case happens to be one of the parties or third party defendants, he certainly is able to take advantage and can use the benefits of that claim. As a matter of fact, that's exactly what we claim.

THE COURT: Assuming for the moment there is such a principle, I would think you would be estopped because you never made such an assertion, you bought the machinery years ago from Auto Pak, you were well aware or certainly there is ample proof in the case that although the blockage certainly didn't occur all the time it occurred with sufficient frequency so that Southbridge knew about it. You never made any claim for breach of warranty against Auto Pak.

MR. ISAAC: We certainly did, Judge. We made it in this case.

THE COURT: That is a protective cross claim.

MR. ISAAC: It is more than a cross claim. There is no obligation on the part of my client -- I think we are getting into an area now which doesn't belong in this case, whether my client --

THE COURT: You are the one that raised it. I didn't raise it.

MR. ISAAC: It is part of the pleadings, and we have a counterclaim the Court must rule on. We have a valid counterclaim as a matter of law because the jury decided that issue.

THE COURT: Let's not be overly certain of that. I did not charge the jury in terms of New York law with respect to a breach of warranty claim being made by the direct purchaser. I charged, as you know, under the rule which has to do with the ultimate user, which is a person who could foreseeably in the minds and eye of the manufacturer, use such a machine.

MR. ISAAC: I understand but --

THE COURT: That's a little bit different than the purchaser yourself, which is your client.

MR. ISAAC: We were leaving those aspects for another time.

THE COURT: Of course.

MR. ISAAC: You wouldn't charge a jury on breach of warranty by my client against Auto Pak, obviously, Judge.

THE COURT: My dear Mr. Isaac, of course not. That is not the point I am making. I am making a different point. In any event, I think I have got you. Let me hear from Mr. Regan.

MR. ISAAC: Let me say something else while I am standing here.

THE COURT: Fine.

MR. ISAAC: In the course of the trial I read from the examination before trial of Universal Thermal. I read from the examination before trial of the designe . If your Honor will recall, the one who installed this machine testified that they were aware of a bridging problem and that the way to take care of the bridging problem was by use of a broom or a stick or a handle of some kind. Not only do I have that in the examination before trial, I have it on the trial of this action.

THE COURT: That's right. Danziger.

MR. ISAAC: Yes, sir. He said that.

THE COURT: I agree. At least so my notes show and my recollection is to that effect.

MR.ISAAC: I don't think your Honor wants to put my client in the shoes of a manufacturer, designer, that it

was necessary for my client to redesign or remanufacture a machine. If the manufacturer and designer of the machine was aware of the problem, as the testimony reveals, and if the installer was aware of the problem, as the testimony reveals and if the accepted practice was to use a stick or a rod of some kind to get rid of these jam-ups, these bridging problems when they occurred, certainly Southbridge Towers, who was a consumer, should not be held to be responsible for remanufacturing and redesigning the instrument. We are a bona fide purchaser in good faith, your Honor, and we are innocent of any wrongdoing with respect to that machine, design or otherwise, and we are not, as a consumer, required to redesign or remanufacture that particular machine. And if the installer knew it, Judge, and that's the way it was taken care of, and the designer knew it, and that is the way it was taken care of, by using a stick to try to unclog these jamming problems, to say that my client was under a duty to do something I just believe from a factual standpoint has no merit. And I say to this Court honestly as a trier of the facts, my client owes absolutely nothing as a participant in this case, absolutely nothing, and I respectfully urge the Court to make that determination. Thank you for your patience.

THE COURT: All right. Mr. Regan, Mr. Ivone in his candor has been somewhat helpful by making your task some-

what easier or at least more pointed. But what say you, sir, so far as Universal is concerned?

MR. REGAN: Your Honor, I have felt all during this trial I was wrestling with a ghost. I never did understand exactly what the claim was against the installer. The pleadings do not allege any failure on the part of Universal to properly instruct Southbridge Towers personnel. In fact, I don't see anything about failure to instruct anybody in any of the pleadings. That is the plaintiff's pleadings against Auto Pak or Auto Pak pleadings against Universal.

Plaintiff's complaint alleges in paragraph eight that the machine was defective in design, manufacture, construction assembly, repair, servicing and installation, and Auto Pak's third party action against Universal adopts the same language. So there is no -- and they throw in the word "owned," owned, operated, controlled, serviced, managed and maintained.

Now, as far as breach of warranty is concerned, I should point out to the Court at no time did Universal in this proceeding own this compactor. We only put it in.

THE COURT: There is no claim of breach of warranty. There is a claim against you of negligence.

MR. REGAN: In what regard, Judge?

THE COURT: I assume -- you heard what Mr. Ivone

said, but he has virtually agreed with me that if we accept the testimony of Herr[illegible] and Danziger and others, then there would seem to be no negligence on your part, in other words, there was no negligence -- nobody is accusing your firm of negligent installation. The only possible claim against your firm, as I understand it, is that you didn't adequately instruct the supervisory personnel of Southbridge as to operation, safety and the like.

Isn't that a fair statement, Mr. Ivone?

MR. IVONE: Yes, your Honor.

THE COURT: There you are. What is your answer to that? Nobody is accusing you of breach of warranty. That's not what we are dealing with here so far as you are concerned.

MR. REGAN: As far as any possible failure on Universal's part to instruct the employees of S[illegible]ridge, I must point out that such was not pleaded, in other words, that is not the theory upon which the case was founded. There is no proof whatever that there was any failure to instruct the supervisory employees of Southbridge. In fact, there has been testimony that Universal did in fact instruct them adequately. There has been no allegation that Universal was under any duty to instruct anybody in anything. The record shows Universal's only obligation was in contract with Auto Pa

to put this compactor in and they didn't have to open their mouth at all. But apparently everybody seems to agree that they exceeded their contractual obligation and did explain the operation of the machine to at least the higher-ups in Southbridge Towers hierarchy. If that information, whether voluntarily given or not, failed to seep down through the rank to Felix Merced, that can't really be used as a basis for a third party action against Universal, particularly where it is not even pleaded.

THE COURT: All right. Very good.

Gentlemen, I will have to reserve decision on this because I promised Mr. Ivone that we would get him to some other judge in the building. Also, I just received a note where I am supposed to be somewhere else that I had forgotten about.

Would you come in at 10:30 o'clock on Thursday morning. I will dictate my conclusions and finding at that time after considering your arguments and reviewing over tomorrow my notes of the testimony and those EBTs which I have copies of, I am quite sure, plus the transcript of the days of February 3rd and 4th, I think. So without further ado, we will stand in adjournment until 10:30. I promise I won't keep you long on Thursday morning.

MR. ISAAC: I am sorry to continue this for one

moment.

THE COURT: I can't. I have to go upstairs, Mr. Isaac.

MR. ISAAC: I want to inform the Court there are also cross claims among the remaining third party defendants, which I am sure the Court will take care of on Monday morning.

THE COURT: Cross claims as to whom? You told me about your cross claim as to Auto Pak.

MR. ISAAC: That would be a counterclaim against Auto Pak. Cross complaint against the third party defendant. The only one is Universal Thermal.

THE COURT: I will deal with that on Thursday.

MR. IVONE: With respect to the exhibits, does your Honor want them?

THE COURT: Yes, could I keep those?

MR.IVONE: Surely.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- -x

FELIX MERCED and MODESTA MERCED, :

Plaintiffs, :

-against- : 73 Civ. 1621

AUTO PAK COMPANY, INC., etc. :

Defendants. :

- -x

New York, New York
February 13, 1975
10:45 A.M.

B e f o r e:

HON. HAROLD R. TYLER, JR.,

District Judge.

A p p e a r a n c e s:

RICHARD E. SHANDELL, ESQ.,
Attorney for plaintiffs.

MICHAEL IVONE, ESQ.,
Attorney for Auto Pak Company, Inc.

ALLEN H. ISAAC, ESQ.,
Attorney for Southbridge Towers, Inc.

WILLIAM REGAN, ESQ.,
Attorney for Universal Thermal

THE COURT: Is there anybody who has had a second thought over the one-day hiatus here of yesterday and wants to add anything?

(No response.)

THE COURT: Nobody wants to say a word?

MR. ISAAC: I think it's all been said, Judge.

THE COURT: Gentlemen, I appreciate your arguments, which gave me a chance to think about this some more, and I am prepared to reach a decision and set forth as briefly as possible the findings and conclusions on which that is based.

At the outset, I should say that for this purpose I am assuming that the jury's verdict was legally sound and that we will accept that proposition for present purposes at least.

This means, of course, that the jury having determined that Auto Pak is liable to Felix Merced under the theories of negligence and breach of warranty and also for the breach of implied warranty of fitness for use by any end user such as Mr. Merced, I proceed to the following:

The testimony in this case having to do with the question of installation, service and the instructions both as to operation and safety in the use of the Gobbler 16 in Building No. 7 at Southbridge Towers has been forthcoming

from a number of witnesses.

In dealing with the question of whether or not Southbridge should make a contribution to Auto Pak under the rationale of Dole v. Dow Chemical Company, I recognize that there is evidence in the record which would support Southbridge's argument that they relied on the installer, Universal, to not only do the technical installation job but also to issue some instructions as to the use of the Gobbler 16.

Mr. Jordan Danziger, who used to be the secretary of Universal, gave some testimony on this issue. Mr. Rivera and Mr. Diaz did, too, in a sense. The evidence seems to be clear that the Universal people did instruct the senior supervisory employees of Southbridge Towers but not porters and handymen such as Mr. Felix Merced. Such training as those gentlemen were supposed to get came from the supervisory people later.

As far as I can make out, there doesn't seem to be any serious question but that the Universal people operated on the theory, which was supported by the user book put out by Auto Pak, which we know as Plaintiffs' 4 in evidence, that this machine would be in continuous operation.

There also doesn't seem to be much doubt but that the Universal people told the Southbridge supervisors

that if there was any doubt about the functioning of one of these machines or possible malfunctioning, the machine should be shut down and the service people, at that time Universal, should be called so they could come over and check it.

There also seems to be evidence that after these units were installed at Southbridge Towers, including the one at Building No. 7, that Universal representatives did see or were aware somehow that it was the practice at Southbridge Towers to have in each building in the compacting room a stick of some four or five feet long of rather stout dimensions and that those sticks would be used by personnel at Southbridge to reach in and break up blockages or bridging of garbage which came down in somewhat unusual dimensions or size and thus cause a buildup or backup up into the chute from out of this arm at an angle which fed the garbage out of the chute down into the actual compacting chamber itself.

Now, you will remember that in the trial there was a great deal of questioning and dispute about whether or not the supervisors actually directed a given person such as Merced to have a stick, but the facts seem quite clear at least to this extent, that every witness who would know about this was well aware of the practice to use sticks

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and the practice seems to have grown up without any particular specific instructions, but nevertheless every building seems to have been familiar with the sticks, every porter and handyman, including Mercel, seemed to know that the stick was available for poking garbage blockages, if need be.

Now, there is no evidence, of course, in the record that I can see that is very firm on just exactly what instructions were given to Mr. Merced in terms of operating the compactor, particularly after he was assigned to Building No. 7 when he came back from Puerto Rico, where he had taken a leave of absence from about July, 1971, to early December of that year. There is some evidence from which I infer that Merced had some familiarity with compactors in other buildings. I recognize that some of the witnesses, such as Rivera, testified that they instructed him rather precisely.

I am not really persuaded that that evidence is very compelling. I don't think that necessarily the witnesses who did testify that they instructed Merced specifically are lying; I just think that they assume they did that.

I think what really happened, more likely, was that when Merced came back, the assumption was that he was an experienced porter and he was just told to go to work

in Building No. 7 and he was, of course, told again about his duties generally and that was about it. I think most everybody in the building assumed, and I can understand this, bye-the-bye, that the Gobbler 16 was a machine whose characteristics by that time were fairly obvious. I think the supervisors like Nelson and Rivera and Cris Sulliverez, people like that, just assumed that these men, after they had been there for a while, knew what was going on, and though there may have been those meetings from time to time that Rivera told us about, I rather doubt that they discussed safety much. I think the real concern was other matters. For example, I think the concern was to make sure that everybody was familiar with the hours of operation of the compactor; I think everybody was concerned with instructing the porters to make sure that the bagging was completed in the morning after breakfast operation so that the bags could be gotten out in the street to be removed by the garbage disposal people, either the City Sanitation Department or perhaps some private carter, I don't know.

I think everybody more or less assumed that Merced knew what he was doing and that he was aware that he shouldn't put his hand in there. Everybody thought he knew how the stick should be used and would use the stick and would not put a portion of his own anatomy in the hopper

door. In short, I don't really think that there were any careful, explicit instructions to Merced. He came back from Puerto Rico, he was assigned to Building No. 7, and since he had been on the job previously before he went to Puerto Rico, I find that he wasn't given any particular, careful instructions at all.

One may say that I am doing that because I disbelieve Rivera. That is true. But I don't conclude that Rivera was a liar. I thought Rivera was a good and attractive witness. I just think that in hindsight, having been asked to think it over by various types at Southbridge, he just assumed that they did with Merced what they probably had in fact done with other porter employees from time to time on a regular basis.

From what I could see, by the way, Merced, contrary to his apparent contention or more likely that of his lawyer, was reasonably familiar with simple English. I think he could have been instructed rather explicity in English and would have understood it. In any event, that was no problem because so many of his supervisors were Spanish-speaking people as well as English-speaking. I just don't think he ever got any real careful instructions about safety in using this machine.

To say this sounds extremely critical, and I

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don't want to overdo it because, quite frankly, I think the experience with the machine had been, in all the buildings of the apartment complex, such that no one had ever been hurt by it and that no one had ever had any great problems using the stick to poke the accumulation or briding of garbage,which occurred by no means as frequently as some of the lawyers would have us believe in their arguments at the trial, particularly plaintiffs' lawyer, but neverless it happened with reasonable frequency so that everybody was used to it, it all seemed to work out all right, and that was that.

Under the circumstances, I think that the third party plaintiff, Auto Pak, has proved by a preponderance of the evidence that there was a failure to adequately warn and instruct Felix Merced in the use of this machine, or, more precisely, not the use as such, which I think Merced understood well enough, but the safety considerations in dealing with the machine, which was powered by a hydraulic motor. What might seem open and obvious to me may not have seemed to open and obvious to Felix Merced.

I think that that duty of careful instruction on safety was probably breached in respect to him, and I surmise as a practical matter why it happened. He came home from Puerto Rico, he isn't the most engaging employee on

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the premises over there, I suspect, and he was given this building and nobody said much about it, they just assumed good old Felix would middle through.

Therefore, on that basis, having made that finding, I determine that in the total context of the accident that it would be fair and reasonable, given all those circumstances, to direct that Auto Pak receive a contribution of 40 per centum from Southbridge Towers.

Now turning to Universal, there has been no competent evidence, indeed, nobody has even argued that it was the duty of Universal to specifically instruct porters and handymen at Southbridge Towers on safety and operation of these machines. Universal was not asked, Universal did not contract to, and there was no moral or general legal obligation on the part of Universal to instruct each porter on safety and operational measures of a given machine in a given building.

There is no evidence that I can determine, and I never heard anyone argue, that Universal installed this machine or any other machine, for that matter, in Southbridge Towers in an improper or negligent manner. There is no evidence, indeed, that Universal did any more than follow the user or instruction book, Plaintiffs' Exhibit 4, and such installation knowhow which they had from other sources.

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There is no evidence that Universal gave Southbridge personnel any erroneous advice as to how to operate the machine. They didn't furnish any erroneous safety information to Southbridge management or supervisory personnel.

Under the circumstances, I do not feel that Auto Pak has proven by a preponderance of the evidence, or, indeed, any credible evidence that Universal was negligent or careless in either its installation or maintenance or service duty.

Obviously, as everyone agrees, no one called Universal personnel to come over on the morning of July 13th because there was a blockage in the compactor in Building No. 7. That never happened. For quite a good reason. This is the kind of thing everybody was used to, and apparently it was the almost universal practice when there was bridging or blockage not to call Universal at all; rather the practice had grown up, as I have already found, to use these sticks which were to be found in the compactor rooms in each building.

Accordingly, this Court finds that there has been no proof satisfactory of the liability on the part of Universal and, thus, any need of contribution under the Dole-Dow rationale by Universal to Auto Pak in this case.

I therefore conclude by ruling that the cross-

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claim, if any, which any other party defendant may have in this case against Universal is dismissed. The third party claim by Auto Pak against Universal is dismissed on the merits.

Now I take up the ingenious argument of Mr. Isaac based upon, as he reminded me the other day, a pleading to be found in the file here. My understanding of that pleading and the theory embodied is as follows: Southbridge asserted a counterclaim against Auto Pak to protect it in the eventuality that the Court were to come down to a judgment or set of findings and conclusions as that just rendered, to wit, liability for contribution on the part of Southbridge to Auto Pak.

Against that liability and percentile of contribution, Southbridge argues that they are entitled to assert a counterclaim for damages for breach of warranty by the seller, Auto Pak, to it, Southbridge, the purchaser.

Accepting and admitting that this is an ingenious albeit perfectly understandable theory of counterclaim, I find that it is rather troublesome in several respects.

To begin with, as I observed previously to you the other day, Mr. Isaac, the warranty which the jury has found breached by Auto Pak is quite a different warranty in law than that which could be possibly asserted by a

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purchaser such as your client against Auto Pak. Now, perhaps it could be said that that is a technicality. I think you would recognize there is a distinction in the law, but you might argue, well, that's just a distinction without a difference.

I am a little uncomfortable with that even so, but I am even more uncomfortable with this approach to the problem. Those machines, including the compactor in Building No. 7, as I understand the evidence, were sold by Auto Pak to the Southbridge Towers some time in 1970. That is almost five years ago. As far as I have been told, nobody ever seriously asserted on behalf of Southbridge any breach of express or implied warranty that might be recognized by the law as existing in favor of a purchaser against a seller of a product like this compactor.

I believe under those circumstances that Southbridge is estopped from belatedly now coming up with this as a fallback counterclaim under the circumstances of this suit.

I would also say that I believe the New York courts would reason that any counterclaim on this theory would cut athwart the contribution doctrine as it is enunciated in such cases as Dole v. Dow Chemical and the progeny cases, of which there are many, as you gentlemen

know, in the New York higher and lower courts since 1972, I believe it is, when the Court of Appeals of our state handed down dole v. Dow Chemical.

Accordingly, for those reasons, I dismiss the counterclaim asserted by Southbridge against Auto Pak.

Now, I believe this disposes of all the open third party claims, counterclaims and cross-claims, but if I have overlooked one, please refresh me, gentlemen.

Do you agree with me on that, Mr. Ivone?

MR. IVONE: I do, your Honor.

THE COURT: Mr. Isaac, have I overlooked anything? I don't think I have.

MR. ISAAC: I haven't recovered yet to be able to answer your Honor's question.

THE COURT: I sympathize with you.

MR. ISAAC: I am not sure whether we covered everything. I think we have.

THE COURT: Mr. Regan?

MR. REGAN: I know of nothing outstanding.

THE COURT: It is easier for you to be calm at this moment than Mr. Isaac. We have to be frank about that.

MR. REGAN: Your Honor, I have other problems.

THE COURT: All right, gentlemen, that will be that.

I would like to discuss an idea I have with you off the record. I don't want to do it on the record until later, until you have a chance to digest what I am about to propose.

Mr. Regan, as far as I am concerned, you are free to go.

MR. REGAN: Thank you.

(Discussion off the record.)

THE COURT: On the record.

MR. ISAAC: Before we close today's session, your Honor, I think the record should reflect that I take vigorous exception to the determination of the Court; I take vigoroush exception to the findings of the Court, I take vigorous exception to the determination of the Court and the evaluation of the Court and the evaluation of the evidence of the Court. I take exception to the basis for the Court's conclusions and, of course, I do this with the greatest respect for the Court but I do this nevertheless as zealously as I possibly can because that is my feeling as an attorney representing Southbridge in this case.

I would also ask the Court to consider the possibility of permitting an interlocutory appeal, assuming we put aside for the moment the other matter that we have discussed at some length. I would ask the Court's thinking

processes on that possibility at the moment.

THE COURT: I will tell you now, I would refuse to sign a certificate under our interlocutory appeals statute because it seems to me that it would only delay matters to take an interlocutory appeal. After all, we are dealing in a field where bifurcated trials have been recommended and actually followed for quite some years now.

There are some judges in this court, for example, who as a common practice bifurcate liability and try that out and then later, if need be, try out the damages to a separate jury. I know of no instances where anybody has ever argued let alone signed a certificate saying that there ought to be an interlocutory appeal between the two, and I don't really see any difference, therefore, between that sort of thing and what we are dealing with here.

Second of all, I would be concerned about overall delay being greater if we were to have an interlocutory appeal now than to take up the whole business later.

And finally, I think it might be an imposition on our appellate court, which is, so far as I read the statistics, heavily burdened and have been so without the services of two active judges which they have not had in recent months.

So for all those reasons, Mr. Isaac, I am frank

to say I would never sign a certificate. I think the best thing to do is to get at it, get the damages resolved either by stipulation or trial, and then go on up on appeal after that.

I am going to give back to you, Mr. Ivone, and make you the custodian and trustee, the exhibits. When you submit your papers, if you would give those exhibits back to me so I can consider them, if need be, again.

MR. IVONE: Yes, your Honor.

THE COURT: Fair enough.

MR. IVONE: Yes.

THE COURT: Thank you. Good day.

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United States Court of Appeals
for the Second Circuit

Felix Merced and Modesta Merced
Plaintiffs-Appellants

against

Auto Pak Company Inc.,
Defendant-Appellee
S & C. Liquidating Corp. Auto Pak Division of Flinch-Bough Products, Division of Gulf and Western Systems Co., Albert Shayne and Arthur Content,
Defendants
Auto Pak Company Inc.,
Third Party Plaintiff
against
Southbridge Towers Inc.,
Third Party Defendant
On appeal from the United States District Court for the Southern District of New York

} AFFIDAVIT OF SERVICE

STATE OF NEW YORK,

COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Katz Shandell Katz & Erasmus Esqs. being duly sworn,

deposes and says that he is over the age of 21 years and resides at

Levittown, New York

That on the **10th.** day of **July**, 1975

he served the annexed **Joint Appendix** upon

1. **Katz Shandell Katz & Erasmus Esqs.**
and
Marie Lambert
Attorneys for Plaintiffs-Appellants
135 William Street
New York, New York

2. **Morris, Duffy, Ivone & Jensen Esqs.**

Attorneys for Defendant-Appellee
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3. Benjamin E. Gellerman Esq.,
Attorney for Third Party Defendant
Southbridge Towers Inc.,
345 Adam Street
Brooklyn, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 10th.
day of July, 1975

Raymond J. Bradley

Robert W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977